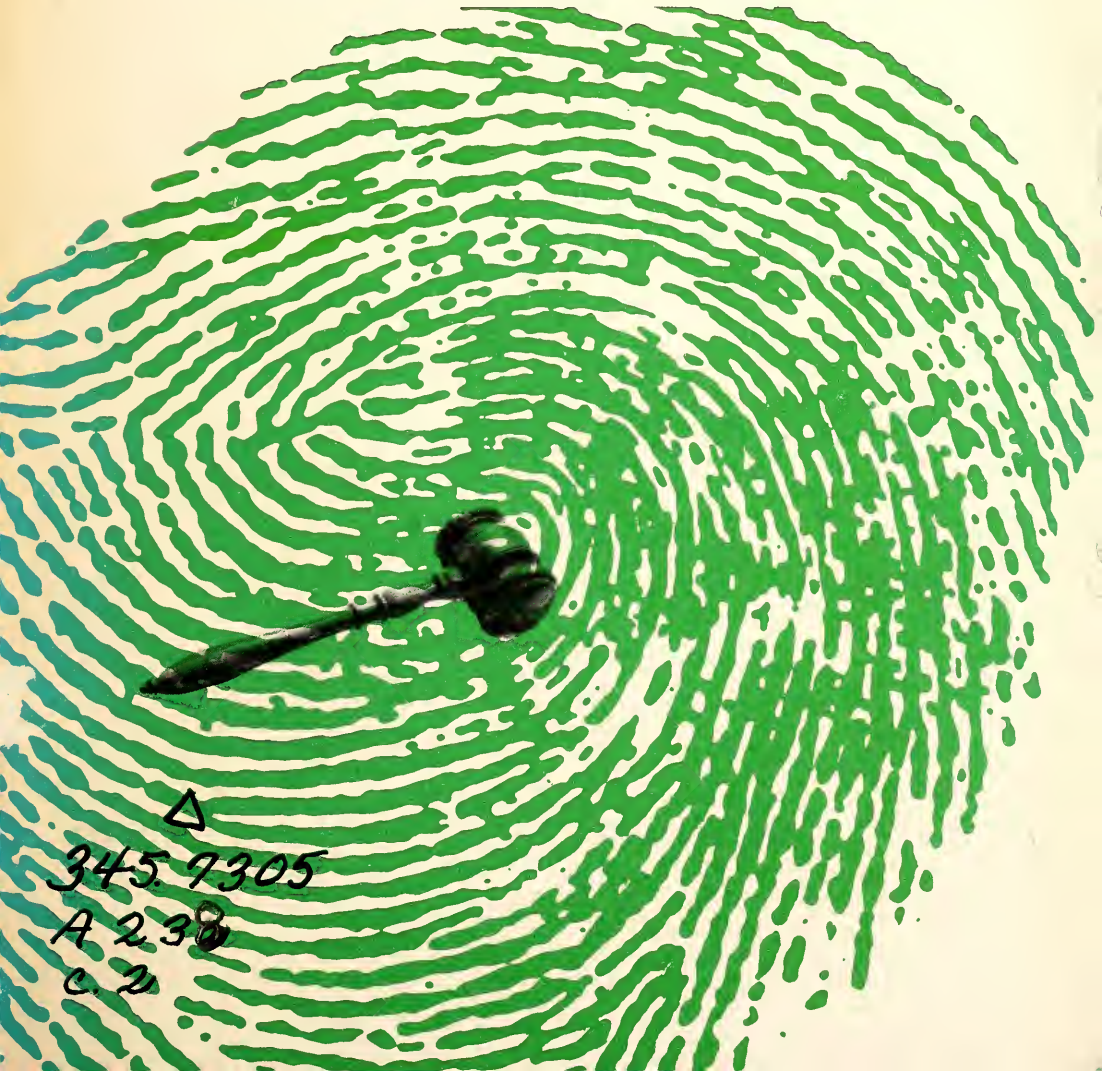
ADMINISTRATION OF CRIMINAL JUSTICE

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ADMINISTRATION OF CRIMINAL JUSTICE

A seminar sponsored by the Institute of Government of the University of North Carolina at Chapel Hill and the Southern Regional Education Board.

Edited by Elmer R. Oettinger, assistant director of the Institute of Government

September 10-15, 1967 / Institute of Government / Chapel Hill, N.C.



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FOREWORD

Winfred L. Godwin

SINCE EARLY in 1966, Southern journalists have been going back to school in a program of continuing education conducted by the Southern Regional Education Board under a grant from the Ford Foundation. Some of the journalists have received fellowships to study for as long as a full academic year at one of the universities participating in the project. Many more have attended seminars lasting a few days.

The seminars deal with aspects of the liberal arts and with social, economic, scientific, and political questions. With the active and enthusiastic co-operation of both the mass media and the educational institutions of the region, the program provides an opportunity for journalists to acquire the background they need to report and interpret in depth and with perspective the daily events which make up this exciting, chaotic, and revolutionary era.

At the seminars news and editorial personnel of the mass media in the fifteen SREB states meet with academic authorities. They are joined by leading laymen in the field under examination. The sessions usually are held on the campus of the sponsoring university, and emphasis is on discussion.

To permit maximum exchange among the journalists and faculty, attendance is limited to 25. The principal beneficiaries of the lectures and discussions are those present. Whenever feasible, the presentations at a seminar have been published so that others may have access to them. This is the seventh such volume.

Winfred L. Godwin, Director
Southern Regional Education Board

INTRODUCTION

Elmer R. Oettinger

THIS VOLUME BRINGS TOGETHER papers presented at a five-day seminar for Southern journalists on "The Administration of Criminal Justice." The seminar was conducted by the Institute of Government of the University of North Carolina at Chapel Hill, September 10-15, 1967. It was sponsored by the Southern Regional Education Board through its Project For Continuing Education of Southern Journalists.

The focus of the seminar was on the problems attending law and order, crime and delinquency, and the judicial process. The seminar planning committee chose specific topics with a view to a cohesive exploration in depth of the crucial aspects of criminal justice. The speakers selected were individuals known for their professional expertise and creative bent. Lively, and sometimes witty and profound, discussions followed the papers, but this publication is confined to the prepared papers.

The search for justice is as old as man's conscience. The means to implement concepts of law and practice as they affect individual and group equity always have been as elusive as they have been important to man's sense of worth and fair play. In a nation which values individual dignity and opportunity to develop personal talent and achievement to the utmost in a spirit of freedom and a framework of law and order, the quest for personal and group justice has en-

gaged minds and hearts from the time the democratic dream first was translated into reality. Yet the complexity of bringing to fruition a process likely to assure a just result has grown with the population and the times. It has been accentuated by racial bias, poverty, inadequate educational opportunity, social and economic chasms, and mass movement of the least affluent, skilled and educated to the cities.

This seminar sought to bring into balance the forces that underlie and mold criminal justice. The speakers strove for perspective on backgrounds, currents, and directions in the administration of criminal justice through evaluation in depth of the law, the trends, and their meaning and significance.

The challenge is not only to combat the negative (involving organized and unorganized crime and juvenile delinquency), but also to develop a positive base of essential values and ethics upon which criminal justice may be approached with vigor, perspective, and effectiveness. Realization of the challenge requires raising standards of governmental performance through professional advancement and public understanding, both of causes and directions. The seminar exemplified the linkage of legal, governmental, and press concern in action, with some emphasis upon humanitarian and social goals, which must underlie advance in the administration of criminal justice.

Elmer R. Oettinger, Chairman
Assistant Director, Institute of
Government, University of North
Carolina at Chapel Hill

TOWARD A REDEFINITION OF THE POLICE FUNCTION

Herman Goldstein

AMERICANS HAVE ALWAYS FOLLOWED the activities of their police with great interest. Police officers are called upon to deal with the unusual in human behavior—with departures from the norm. What they do has news value, as reflected in the extensive coverage given by mass media to police activities in comparison with other functions of local government. And what they do has great entertainment value, as reflected in the number of novels, comic strips, motion pictures, and television programs that are built around the police.

Intense as this interest has been, it has also been highly selective. It has, for the most part, been limited to those aspects of police work that relate to the solution of major crimes, to the suppression of organized vice activities, to the handling of the unusual emergency situations that receive police attention, and, out of a sense of curiosity, to police activity involving neighbors. It has rarely extended to the much more routine phases of the law enforcement function—tasks that occupy most of a police officer's time and that pose the more difficult and complex problems involved in the policing of a free society.

Developments in the civil rights field during the past several years have served, in a variety of ways, to change this situation. Court decisions relating to the rights of individuals accused of having committed a crime, for example, have given

rise to a widespread debate that has, in turn, served to acquaint the public with important aspects of the legal process by which the police are required to handle alleged offenders—a process which received little attention in the past.

Demonstrations, such as those staged in behalf of the integration of public facilities or in support of open-occupancy laws, have drawn public attention to the peculiar and delicate role of the police in protecting the rights of minority groups when subjected to overt acts of hostility on the part of the majority. And outbreaks of violence, such as occurred in Watts, Newark, and Detroit, have focused public attention upon the role of the police in suppressing mass disorder and have increased public interest in police practices and policies that, it is claimed by some, contribute to the conditions that give rise to riots.

Paralleling these developments has been a new wave of anxiety regarding the crime problem. This has led, among other things, to the creation of the President's Commission on Law Enforcement and Administration of Justice, which recently completed its exhaustive studies. The Commission devoted a substantial portion of its total resources and effort to an examination of the status and needs of law enforcement in this country. Its findings, in turn, have given rise to public discussion of police needs and problems and have stimulated state and local governments to initiate similar inquiries.

The Rush Toward Action Programs

A natural consequence of this sudden increase in interest in the functioning of the police has been a whole series of proposals that are intended to strengthen the capacity of law enforcement agencies to meet the demands being made upon them. Offered by commissions, legislators, governmental officials, citizen groups, and, of course, the police themselves, they range from the very specific and carefully formulated recommendations of the President's Commission, on the one hand, to the sweeping appeal of the John Birch Society, on

the other, to "support your local police." The proposals provide for such varied objectives as a liberal arts education for police officers and advanced training in riot control. Included among the more frequently cited suggestions are those which would raise police salaries, increase the number of police officers, construct training facilities, and establish minimum standards for police personnel.

Evaluating the feasibility of any one of these proposals is made difficult by the fact that we are so lacking in our knowledge of what it is that the police do in our society and so ambivalent over the nature of their role. There have been few serious efforts to gain insight into the function performed by the police—the degree to which it differs from one jurisdiction to another and the various factors and pressures that contribute toward its definition. That we should have such little understanding is somewhat surprising when one reflects upon the importance of the police function in a free society and when one considers the tremendous resources that are devoted to law enforcement. Absent such an understanding, many of the recommendations currently receiving the most enthusiastic public support are based on nothing more than a stereotype notion of both the nature of police work and the character of the problems with which the police are confronted.

There is, for example, a noticeable tendency to place increased reliance upon laboratories as a means for dealing more effectively with the crime problem. It is true that much greater use can be made of the scientific analysis of physical evidence as a means for solving crimes, but it is widely recognized within police circles that only a very small percentage of the total police function is affected by developments in this area. Much of the support for crime labs, it seems, stems from a "Dick Tracy" concept of policing.

In his "State of the Union" message, President Johnson indicated his intention to seek financial support to increase the size and number of "task forces"—units that are commonly assigned to policing areas having a high incidence of crime. This proposal reflects the widely held notion that the

hiring and assignment of additional police officers is the primary means by which to reduce crime. Aside from the fact that there is no firmly established basis for anticipating such results, the specific proposal of the President might well produce some unanticipated side effects. What little we do know about the traditional patterns for patrolling high crime rate areas in large cities suggests that, unless there is a significant change in police functioning, the mere addition of more men is likely to increase existing hostilities and, as a result, substantially increase the potential for massive disorder.

In similar fashion, the other common proposals for strengthening police operations point to the need for gaining a better understanding of what it is that we expect and want the police to do and what the effect of the proposals is likely to be upon implementation. If training is to be increased and made more effective, there is need for considerable work in defining the tasks and in identifying the situations which police officers are likely to encounter. If a college education is to be required of a patrolman, consideration must be given to the manner in which he is to be utilized—lest we increase the already high level of frustration that patrolmen experience. If recruiting efforts are to be intensified, standards must be more accurately related to expectations. It makes little sense, for example, to place the highest priority upon physical prowess if the most demanding aspect of the police function calls for intelligence and social acumen.

Some Generalizations Regarding the Police Task

As one turns to explore the police function, one quickly finds that the principal and most valuable source of information is the police officer—the officer having years of experience at the operating level and, to a somewhat lesser extent, the officer who has carried some administrative responsibilities. But a combination of factors constrains these men from conveying their wealth of understanding into the public forum. Much of what he sees and does, the average officer feels, is defined by the nature of the public's interest in the

police as being of minor consequence. More inhibiting, however, is the fact that the officer is a member of a semimilitary organization that places a value on secrecy and that discourages free expression by subordinates.

Frequent contact with the experienced officer and five years of administrative responsibility in a police agency have led me to conclude that there are several generalizations that can be drawn regarding the police function that are helpful in any further analyses that might take place.

1. *Solving crimes and apprehending criminals constitute but a small percentage of the total activity of a police force.*

A St. Louis County police officer was recently quoted in an article in *The National Observer* as stating: "I thought of police work as a life full of adventure and daily heroic deeds. It turned out to be mostly settling family fights, answering complaint calls about loud parties, dogs running loose, and that sort of thing." This characterization of police work coincides with the impression received by many individuals who have taken the opportunity to accompany a police officer on a night's tour of duty—even in an area of a large city having a high crime rate. Persons taking advantage of such an opportunity almost invariably report that the officer considered the night unusually "slow" and apologized for the lack of "action." But the consistency of the reported experiences suggests that what the observer saw is probably more typical of the manner in which the officer spends his time than he is prepared to recognize.

Police activity unrelated to the solving of crimes and the apprehension of criminals falls into four major categories: (a) the provision of social services; (b) the suppression of nuisances; (c) the control of motor vehicle traffic; and (d) the provision of a wide range of miscellaneous emergency-type services.

Provision of Social Services: It is estimated that police officers assigned to the congested areas of large cities devote

as much as sixty per cent of their time to the handling of domestic disturbances. While the domestic dispute is basically a social rather than a criminal problem, citizens turn to the police for intervention because of the likelihood of physical harm. Unlike the social agency, the police have the capacity to respond to a call within minutes at any time of day or night, seven days a week, and are generally recognized as having the physical ability and authority to intervene.

In a small percentage of these cases, when injury has been inflicted, police involvement takes the form of a traditional investigation and prosecution. In the vast majority of such cases, however, the skill that is required more closely approximates that of a social worker. Because the handling of domestic disturbances is not normally thought of by the police as being among their more important functions, there has been little effort, despite the time which such cases consume, to develop a uniform response. The action taken, therefore, is largely dependent upon the interest and initiative of the investigating officer. He may undertake to mediate the dispute. He may simply order the husband to leave the home for the evening. Or he may dismiss any concern for the matter once he establishes that a crime has not been committed.

From the standpoint of volume, domestic disturbances dominate the category of police activity that requires the knowledge and training of a social worker. Somewhat similar are the requests which the police receive for dealing with the problems of the mentally ill, the senile, the chronic inebriate, the runaway child, the neglectful parent, and the truant.

Suppression of Nuisances: In the congested areas of large cities, where actions of one group of citizens are more likely to affect others, the police are very frequently called upon to "keep the peace." Requests for service most frequently take the form of complaints regarding such matters as loud parties, loud radios, trespassing, and the blocking of sidewalks and driveways.

The authority of a police officer to act in such situations is not always clear. When there is general agreement, between the police and the citizens involved, that the situation complained against does have the potential for constituting a nuisance, the appearance of a uniformed officer on the scene is usually sufficient, in itself, to persuade the parties to reduce the noise or to disperse a gathering. More complex is the situation, such as the congregating of individuals on a street corner, that tends to be defined as a nuisance *per se* in the minds of police officers, even though there may be no complainants and there may be no apparent interference with the peace of the community. Police intervention in such situations is likely, under some circumstances and in some areas, to be offensive to the individuals affected.

Like the domestic disturbance, situations of this kind are generally considered, by the operating police officer, to be of minor importance. The nature of the police response is rarely subjected to review or examination. And yet, it is increasingly apparent that the attitude of a minority community toward the police is largely molded by their impressions as to whether police action in such situations is fair or indiscriminate.

Police handling of nuisances offers an excellent example of the wide range of circumstances in which the police invoke some element of authority without actually making an arrest. While this may seem common and obvious, a failure to recognize such situations has led some to place heavier dependence than is justified upon judicial review as a means for controlling the exercise of police authority, when, in fact, most of the situations in which police authority is exercised do not come before a judge for trial.

Control of Motor Vehicle Traffic: The percentage of police resources devoted to the enforcement of traffic laws, the direction of traffic, and the investigation of traffic accidents varies significantly in this country from jurisdiction to jurisdiction. Some state police agencies are established exclu-

sively for the purpose of controlling traffic, while, in large cities, responsibilities relating to traffic control tend to become integrated into the total police function to the point that it is difficult to even estimate the amount of time they consume. It can be argued that a substantial percentage of the enforcement function in large cities is absorbed without sacrificing other functions, since it is relatively easy for a police officer to enforce traffic laws while engaged in routine patrol. Indeed, some police officials are of the view that traffic enforcement duties actually add to the overall effectiveness of a police officer's patrol efforts, since it enables him to make use of his recognized responsibility to enforce traffic laws as a means for investigating drivers suspected of having stolen the vehicles in their possession or having used their vehicle in the commission of a crime.

On the other hand, responsibilities relating to the direction of traffic and to the investigation of accidents tend to be much more time-consuming and disruptive. The latter is especially apparent when poor weather conditions cause a rash of accidents—a situation that has the potential for tying up an entire police force.

More significant than the demands on time, however, is the fact that increases in traffic control responsibilities have served to redefine the clientele with whom the police most frequently come in contact. This has far-reaching implications for both the police and the public. Traffic violators, unlike criminal offenders, represent a cross section of the community. From the police standpoint—and especially from the standpoint of the officer accustomed to dealing with criminal matters—the absence of a clear line between the "good guys and the bad guys" and the absence of the "evil" element that attaches to most criminal offenses make traffic enforcement an uncomfortable area in which to function. From the citizens' standpoint, the contact which they have with a police officer as a traffic violator may be their only contact with a law enforcement agency. As a result, it has a major influence on their attitude toward the police and

usually serves as the basis for their reaction to other aspects of police functioning.

Provision of Miscellaneous Emergency-type Services: It is to the police that most citizens turn when they require emergency transportation to a hospital, when they are locked out of their homes, when their child is lost, or when a cat must be removed from a tree. In congested areas inhabited by the poor, the police are often called upon to care for the ill, to deliver babies, and to force a landlord to provide required heat.

The primary reason such requests are directed to law enforcement agencies is apparently because the police are the only agency of local government available twenty-four hours a day, seven days a week, that has manpower available and dispersed in such a way as to make it possible for them to respond.

To the extent that the police have been concerned with the nature of their function, it is interesting to note that their concern has related almost entirely to these miscellaneous services—with the avowed objective of divesting themselves of continuing responsibility for them. Appealing as this may be from the police standpoint, there is no readily identifiable alternative by which needs of such an unpredictable and intermittent kind can be economically and efficiently met by municipal governments.

2. *Police have relatively little potential for preventing crime and outbreaks of violence.*

From the very beginnings of the police service in England, emphasis was placed upon the role of the police in preventing crime. Indeed, Sir Charles Rowan, the first commissioner of the Metropolitan Police, in speaking of prevention, said: "To this great end every effort of the police is to be directed. The security of person and property, the preservation of the public tranquility and all the other objects of a Police Establishment will thus be better effected than by the de-

tection and punishment of the offender after he has succeeded in committing the crime. . . ." The degree to which Rowan and others were dedicated to this "principle of prevention" is reflected in the apparent opposition that they voiced to the appointment of the first individuals who were to devote all of their efforts to detection—the prototype of our modern-day detective.

In the intervening years, prevention as a principle of policing, in the sense in which it was first developed, has come to have little influence on the organization, staffing, and operations of our police forces. Modern police agencies are primarily geared to catching criminals. Prevention, as the term is used today, has come to characterize some of the activities in which the police are engaged, such as their patrol efforts, their work with juveniles, and their efforts to educate the public on conditions in one's home, car, or business that accommodate burglars and thieves. Within the total context of the police function, these activities, aimed at preventing crime, must compete with the more dominant concern for solving crime and apprehending criminals. In practical terms, this means competition for police manpower and for the budget dollar. The end result is that the preventive function tends to receive attention only when personnel are not otherwise occupied.

Despite the relatively small percentage of total police resources that go directly into preventive programs, police administrators in this country have continued to characterize prevention as one of their primary responsibilities—if not their most important one. Such a contention is an appealing one, for it has a positive ring to it, drawing public attention away from the somewhat negative image of the police as being exclusively oriented toward the catching and punishment of wrongdoers. The position has created a double-edged sword for the police, however, since it has encouraged the public to hold the police responsible for that crime which does occur. The number of reported crimes in a community, for example, are often taken as an indication of police ef-

ficiency. An upward trend in the crime rate is viewed as indicative of a failure in police operations. And, in similar fashion, the occurrence of an especially vicious crime is often followed by a public indictment of the police for having failed to prevent it.

All of these claims, on the part of both the police and the public, tend to ignore what is obvious to those who have been involved in the provision of police services: the capacity of the police to prevent crime is, indeed, very limited.

The primary method that the police must depend on for preventing crime implements the very elementary concept that a person contemplating a criminal act will not commit it if he can be convinced that he will be identified or apprehended in the process. As a result, most police efforts have been directed at making their presence felt to the maximum degree—as reflected in their use of conspicuously painted cars and their increased use of motorized patrol which, in contrast with foot patrol, has the potential for creating an impression of police omnipresence. There have been no serious efforts to measure the effectiveness of patrol as a crime-prevention method. It is clear, however, that whatever impact it has is limited to certain types of crimes that occur on the streets. A patrolling police officer, for example, is not likely to deter crimes of passion or to interfere with the carefully planned offenses of the professional criminal—most of which occur within private premises.

A dramatic and much heralded experiment conducted some years ago in New York City proved the obvious—that the saturation of an area with police officers will reduce crime. It did not examine the influence upon the crime rate outside the saturated area, nor did the experiment include any effort to determine whether the residents of the area were well prepared to tolerate such an intense degree of surveillance on a continuing basis and whether the taxpayers of the community at large were prepared to underwrite the cost of the required manpower. Police patrolling, as a preventive

technique, is inherently limited in its effectiveness by all of these considerations.

An underlying assumption of patrol activities is that the offender fears the consequences of apprehension. The effectiveness of patrol, therefore, as a crime-prevention technique, is largely influenced by the reputation which the criminal justice system of a jurisdiction establishes as to its handling of given types of offenders and especially as to the sentence imposed upon an offender found to be guilty.

Another factor, often ignored, is that there is no firm legal basis for police work aimed at preventing crime. Most police authority over an individual usually begins when a police officer has reasonable grounds to believe that the individual committed a crime. Police cannot, for example, simply in the interest of preventing crime, search cars, explore private premises, or detain an individual.

All of these considerations force recognition of the limited capacity of the police to perform in a preventive role and—more basically—force a renewed awareness that, while the police may reduce the opportunity for the commission of a crime, their efforts do not begin to affect the deep-rooted causes of crime. Obvious as this realization may be, somewhat the same error that has been made in looking to the police for the prevention of crime is now being repeated with regard to the police role in preventing the outbreak of racial violence. It is true that the police can do much to lessen the likelihood of violence by assuring that their practices in the policing of the minority community are fair and proper and by promoting a dialogue that facilitates the filing of complaints. But even with the best programs in this area, the police, alone, cannot prevent riots. If civil disorder is to be avoided, communities must deal with the prejudices and bigotry that give rise to discrimination in employment, housing, and education.

Police efforts to prevent crime and to prevent outbreaks of violence, if they are to be meaningful, must be more realistically defined. Continuation of the existing approach

that places demands and expectations upon the police that are impossible of achievement is disruptive of any serious efforts to improve the police service.

3. *Individual officers are required to exercise broad discretion in the fulfillment of their police responsibilities.*

The police are commonly viewed as a ministerial agency having no discretion in the exercise of their authority. While this view is occasionally reinforced by a court decision, there is a growing body of literature that cites the degree to which the police are, in fact, required to exercise discretion—such as in deciding which laws to enforce, in selecting from among available techniques for investigating crime, in deciding whom to arrest, and in determining how to process a criminal offender. Broad and oftentimes ambiguous statutes defining their powers and the limited resources made available to them are the major factors among several that require the police to assume a discretionary role.

In practical terms, the necessity for exercising discretion is reflected, for example, in the need for a police administrator to decide how much of his resources are to be devoted to traffic enforcement, as distinct from criminal investigations; in the decision of a police officer to arrest a disorderly group or order the members to "move on"; and in the determination of a juvenile officer to release a child to his parents rather than take him before the juvenile court. However the police officer acts, his decision is likely to have a major impact on the individual involved. Americans tend to be sensitive to any exercise of police authority—even if it does not result in an arrest and prosecution.

Most such decisions, in the absence of adequate legislative guidelines or administrative policies, are left to the discretion of individual officers. Confronted each day by frequently recurring situations, they either develop their own informal criteria for disposing of matters coming to their attention—depending heavily upon their imagination and resourcefulness—or they employ informal criteria which have, over a period of years, developed within the agency of which they

are a part. The individual officer succeeds, to an amazing degree, in muddling his way through: disputes are resolved; dangerous persons are disarmed; people not in control of their capacities are protected; and many individuals are spared what, under some circumstances, would appear to be undue harshness of the criminal process. The results, however, are sometimes less satisfactory—primarily because the criteria that are employed emerge largely in response to a variety of pressures to which the police are exposed and which are, therefore, not carefully developed. For example, the high volume of work which an officer must handle dictates a desire to take shortcuts in the processing of minor incidents. The personal conveniences of the officer—in making a court appearance, in completing reports, or in working beyond a scheduled tour of duty—become important determinants of how a case is handled. The high value attached to solving crime becomes a dominant consideration—often to the exclusion of other, more important values. And such indefensible criteria as the status or characteristics of the complainant, the victim, or the offender are often found to be among the most seriously weighted factors, since an officer, left to function on his own, understandably tends to respond to a given situation on the basis of his personal norms regarding individual or group conduct. The criticism commonly directed against police agencies regarding the exercise of police authority most frequently relates to discretionary actions rather than the clearly illegal use of police powers.

The Need for Research and Public Discussion

My purpose in making these three broad generalizations regarding the nature of police work (i.e., the noncriminal aspects of much of police activity, the limited role of the police in preventing crime, and the fact that the police are required to exercise discretion) is threefold: (1) to call attention to the significant difference between the actual functioning of the police and the widely-held notions regarding

the character of police operations; (2) to illustrate some of the major problems and issues that are raised by actual police functioning; and (3) to point up the need for addressing these problems and, more broadly, for clarifying our thinking regarding the police role in our society as a prerequisite to undertaking specific programs intended to strengthen and improve our law enforcement agencies.

Clarification calls, initially, for establishing more facts. Many of the matters on which I have generalized and speculated ought to be explored more carefully and in greater detail through specially developed research programs. A beginning must be made, for example, towards attempting to measure the value of police efforts to prevent crime so that some judgment can be made as to the extent to which a community ought to invest in this aspect of the police function. There are many opportunities for conducting controlled experiments in an effort to measure the effectiveness of different approaches to the policing of a community.

Clarification also calls for subjecting current police practices and the major issues relating to them to public discussion.

If, for example, the police are to continue to handle the wide range of social problems that presently come to their attention, what should their response be? Should the choice be left to individual officers, or should there be some uniform agency-wide policy? If there is to be a policy, should the policy limit the police to taking action only if it is determined that a crime has been committed? Or should the police objective be to resolve the problem, such as a domestic dispute, in some manner? Should the officers go further and refer the parties involved to community resources that may be of some assistance to them? And if the choice is the latter, should there be any follow-up on the case by the police?

If the police are to be held responsible for the prevention of crime, how can their role be realistically defined? And if this is done, what do the police need in manpower and legal authority to equip themselves to meet their defined role

adequately? Should the need for the police to exercise discretion be recognized by the legislature? How should it be controlled?

Directions for Change

If I were at this time, without the benefit of research and public discussion, called upon to suggest the major paths for development of the police field in the years ahead, I would settle upon two major objectives.

The first would be the *development within the police field of a stronger and more basic commitment to the values that must attach to the police function under democratic government.* In a society that places so high a value on freedom and individual rights, we must insist that police officers, who are authorized to interfere with these rights, not only understand them, but that they and the agencies of which they are a part have a basic commitment to championing them above all other considerations as they are called upon to exercise their authority. This means, at the operating level, that, however isolated is the contact between an officer and an alleged offender, the officer would, on his own volition, be dominated in his choice of action by a desire to exercise proper concern for the rights of the offender. The police of this country must come to be viewed, foremost, as the guarantors of constitutionally granted rights and, only secondarily, as the catchers of criminals. Among the benefits that would flow from such an orientation would be a greater willingness to give to the police the authority and discretion which are needed if their effectiveness in the prevention and solution of crime is to be increased.

My second objective would be the *development within the police field of a desire to meet more effectively the variety of social problems of a noncriminal nature that come to police attention.* It is apparent that many social problems, such as family discord, mental illness, or inadequate housing, will continue to come to the surface in a way which brings them, initially, to police attention. Police intervention at so critical

a moment can have the effect of aggravating an already difficult situation, or it can constitute the first step, in collaboration with other community resources, toward solving the underlying problems. It can have a direct effect upon the incidence of crime by preventing an assault from occurring, or it can have a more long-range effect by strengthening the stability of the family unit. It follows that the devotion of more attention by police administrators to such problems has the potential for increasing substantially both the efficiency and effectiveness of the police response. Greater police involvement in this area also has the potential for diluting the harshness that often characterizes the police as enforcers of the law—casting the police in a more helpful, supportive, and positive role in the community.

Effecting Change

There are, in this country, a large number of extremely capable, intelligent, and conscientious police officers who have the drive, the basic conviction, and the desire necessary to move the police toward these stated objectives. But such officers are clearly in a minority and they are, for the most part, rendered impotent in their influence upon the quality of law enforcement by a value system dominating the police field that is diametrically opposed to the kinds of movement suggested here.

Police officers are generally committed to a hard-line in support of law and order. They are in favor of strong punitive actions against offenders, restraints on persons engaging in activities likely to provoke others, and the strengthening of their authority to investigate crime. They are suspect of anything that smacks of permissiveness and have little patience for those would argue, for example, that crime is a product of the environment. This overall approach aligns the police against such varied groups as the Supreme Court, civil rights leaders, social workers, and academicians—all of whom are viewed as being anti-police.

The difficulty with this approach is that it reflects a gross

oversimplification of some of the underlying problems. The common police posture, for example, indicates a failure to comprehend the complicated factors that give rise to criminal activity. It reflects a failure to understand the dynamics of a changing society in which there is a continuing drive to achieve greater equality. It reflects a failure to understand the role of dissent. And it reflects a failure to comprehend the direct relationship between the necessity of guaranteeing the rights of an individual accused of a crime and the kinds of ambiguous statements regarding our basic freedoms that are contained in Fourth of July talks—which readily win police support.

The police value system, however, does not exist in isolation. It has been created by—and is continually reinforced by—the community. This is largely by design. We have always had, in this country, a strong commitment to local control of law enforcement. The perpetuation of thousands of small, inefficient police agencies and the continuous opposition to strengthening or increasing national and state agencies mirror this commitment. Police chiefs are generally responsible to public officials who are themselves subject to election. Recruitment is often restricted to local residents so as to assure, among other things, that the community is policed by individuals likely to respond to local peculiarities and demands. And currently, we are witnessing the launching of a wide range of programs designed to improve police-community relations in which the emphasis is placed upon attempting to identify the police with the community and make them more responsive to the needs of the community.

All of these techniques have, together, been very successful in achieving their proclaimed objective. The views and policies of most police administrators, in my opinion, accurately reflect the views of the community. And, to the extent that liberals may criticize such views and policies as overly conservative, superficial and, at worst, stupid, it is my guess that they might just as well direct their criticism against the total community of which the police are but a microcosm.

Considering the degree to which we attempt to make the police answerable and accountable to the community, it seems somewhat inconsistent to ask that the police take the leadership role in effecting a change in the character of the police function. The police chief who attempts to implement a court decision with meaning, who takes positive action to protect the rights of a minority group to demonstrate, or who attempts to work with a juvenile gang in a constructive way is very likely to find himself at odds with the majority of the community he serves. To urge a chief to exercise a role of leadership in these areas is to urge, in some jurisdictions, that he adopt a suicidal path. Unless unusual circumstances exist, he does not operate from a sufficiently strong base to exert such leadership, nor is the community accustomed to looking to their police chief for guidance in matters of social reform.

All of these considerations point to the need for a more widespread recognition that a change in the nature of the police function in this country requires a change in the nature of the demand made upon the police by the public. If a community wants a police force that is dedicated to fairness, it must select a police leader whose concept of the police function places the high value on fairness that was suggested earlier in this paper. In like fashion, if a community wants a police force to collaborate with private and governmental agencies in an effort to deal with the community's social problems, it must elicit the kind of interest and concern from their police administrator that will make it clear that the community places a positive value on such involvement by the police.

In practical terms, such influence can take several forms. It can be in the form of support for a police leader at critical times when, for example, he acts to protect the right of a minority-group citizen to reside in a segregated neighborhood—or when he acts to protect the rights of a person accused of a crime that has angered the community. It can be in the form of restraint from making demands upon the

police that result, for example, in their picking up large numbers of individuals, in dragnet fashion, for questioning in connection with the investigation of a serious crime. And, finally, influence can be brought to bear in the form of assistance to the less articulate segments of the community who are most frequently the subjects of police action, by aiding them in making their requests for proper police service known. This process for effecting change is obviously slow and cumbersome. It lacks the attraction inherent in current proposals for increasing the size of task forces, providing riot training, and establishing crime laboratories. Slow and cumbersome as it may be, however, it appears to be the only process by which we can achieve the kind of fundamental change in our concept of policing that will result in the police becoming more responsive to the peculiar needs of a democratic society.

THE POLICE AND THE SUPREME COURT

Jerome H. Skolnick

I AM A SOCIAL SCIENTIST, not a lawyer. That statement is intended to have a double significance. First, it is to be considered partly as an excuse. I shall be discussing law cases, and the statement serves in part an an apology for error. Second, I shall also be attempting to suggest how a social scientist makes a rather different kind of sense out of these legal phenomena than a person trained in the tradition of the law might.

With that combination of caveat and apology I am going to quote briefly to you from Thomas Kuhn's *The Structure of Scientific Revolutions*. Kuhn writes: "Today's physics text books tell the student that light is photons, i.e., quantum mechanical entities that exhibit some characterisics of waves and some of particles . . . That characterization of light is, however, scarcely half a century old. Before it was developed by Planck, Einstein, and others early in this century, physics texts taught that light was transverse wave motion, a conception rooted in a paradigm that derived ultimately from the optical writings of Young and Fresnell in the early nineteenth century. Nor was the wave theory the first to be embraced by almost all practitioners of optical science. During the Eighteenth Century the paradigm for this field was provided by Newton's *Opticks*, which taught that light was material corpuscles. At that time physicists sought evidence,

as the early wave theorist had not, of the pressure exerted by light particles impinging on solid bodies.

"These transformations of the paradigms of physical optics are scientific revolutions, and a successive transition from one paradigm to another by a revolution is the usual developmental pattern of mature science." (p. 11)

One conclusion, I take it, that may be drawn from this brief description of scientific revolution is that such revolutions involve fundamental reconceptions of the nature of the phenomena being observed. The sociologist who is in the business of studying legal phenomena such as police courts and lawyers is under a similar obligation to draw a paradigm, or model, or conception, of these phenomena.

By explicating certain outstanding features of the structure and processes of law enforcement, I shall attempt to suggest an alternative paradigm for the criminal law enforcement process in the United States. This paradigm envisions criminal procedure as an administrative system rather than as an adversary system. This administrative paradigm, I shall contend, destroys a popular but illusory criticism of the United States Supreme Court and other appellate courts—the criticism that they are handcuffing the police. For that criticism from the right, as it were, I shall substitute a far more melancholy one from the libertarian left, namely, that the appellate courts possess neither the power nor increasingly, the inclination, to control the police at all.

Two Preliminary Points

I should like first to make two preliminary points. One is that what I have said so far is already too general. Different court decisions are intended to influence different kinds of police practices. For example, the *Miranda* decision, requiring that the accused be informed of his right to counsel before interrogation, invites a different kind of analysis than *Mapp v. Ohio*, which imposed the exclusionary rule of evidence upon state courts. *Miranda* goes to the freedom and limitations of police in obtaining confessions and is intended

to protect the accused against self-incrimination. *Mapp* attempts to exclude illegally seized physical evidence from the trial protecting the individual against unlawful searches and seizures. Thus, one cannot rely upon a general analysis that would automatically explain the effects of both *Miranda* and *Mapp*.

At the same time, and this is my second preliminary point, there are general features of the administration of criminal justice in the United States that must be understood before any attempt can be made to dissect the effect of any court decision on the conduct of law enforcement. And these characteristics become sharpened and illuminated when the system is visualized in terms of an administrative paradigm. Seen in this light, the very notion of criminal law itself takes on a different emphasis. For example, when a legislature passes a law and sets penalties for the commission of an act—for example, possession and sale of heroin—the legislature itself does not condemn and punish. Rather, it only threatens to do so. The actual apprehending, condemning and punishing are always carried out by other agencies and officials in the criminal justice system—police attorneys, both prosecuting and defense, and, to a relatively slight degree, trial judges and jurors. From the point of view of an administrative system, bonding procedures explain more of the variance in outcome than the decisions of jurors.

Justice Without Trial

This is because the administration of criminal justice in the United States is, in the main, a system of justice without trial. The majority of cases are disposed of outside the traditional trial process, either by decision by prosecutor or police not to charge a suspect with a criminal offense or by a plea of guilty by the accused. In many communities between one-third and one-half of the cases begun by arrest are disposed of by some form of dismissal by police prosecutor or judge. When the decision is made to prosecute, it is estimated that in numerous courts, as many of 90 percent of all con-

victions or, as in New York County, up to 99 percent, are obtained by pleas of guilty.

As Martin Mayer recently wrote in a New York *Times* article describing the office of New York County District Attorney Frank Hogan: "Our legal theory and text books, our Supreme Court, our newspapers and magazines all discuss an 'adversary system' of criminal justice, in which witnesses are examined and cross-examined in open court and a jury votes that it has or has not heard proof beyond a reasonable doubt. But in New York County—and to only somewhat lesser degree in other jurisdictions—what we really have is an administrative system of criminal justice, where the evidence is weighed and the important decisions are taken in the prosecutor's office. In Manhattan the primacy of administrative process is so thoroughly recognized that cases are assigned for trial not to a judge but to an assistant D.A., and do not go on to a judge's calendar until the D.A. puts them there." (*The New York Times Magazine* July 23, 1967, p. 44)

I cannot here discuss all of the implications of an administrative system for such legal principles as presumptions of innocence, burden of proof, and weight of evidence. I would like to suggest, however, how an administrative system influences the defense attorney's role in the administration of criminal justice; and how that role in turn undermines the control potential upon police of such a decision as *Miranda*.

When the defense attorney is viewed in the paradigm of the adversary system, he is perceived as an aggressive counselor, acquittal-oriented. In words of Professor Allen he adopts a posture of "constant, searching and creative questioning of official decisions and assertions of authority at all stages of the process." That is the paradigm for the defense contemplated by the adversary system.

Sociologists who have observed the operation of criminal law and action have drawn an operating model of defense attorneys that contradicts the paradigm for the defense contemplated by the adversary system. Thus, we find Abraham S. Blumberg describing defense attorneys as follows: "The

defense attorneys . . . whether of the legal aid, public defender variety or privately retained, although operating in terms of pressures specific to their respective role and organizational obligations, ultimately are concerned with strategies which tend to lead to a plea. It is the rational, impersonal elements involving economies of time, labor, expense in the superior commitment of the defense counsel to the rational values of maximum production . . . that prevail, in his relationship with a client. The lawyer "regulars" are frequently former staff members of the prosecutor's office and utilize the prestige, know-how and contacts of their former affiliation as part of their stock in trade . . ." [Blumberg, A.S., "The Practice of Law As A Confidence Game," *Law and Society Review*, Vol. 1, No. 2, June 1967, pp. 23-24] (Blumberg further points out that these relations between prosecutor and defense attorney typically overshadow the relationship between lawyer and client, as they must under a system where prosecutor and attorney rely on the other's cooperation for their continued professional existence.)

What then does the system of administrative justice, of plea bargaining, imply for such a Supreme Court decision as *Miranda* and other cases that seemingly protect constitutional rights to counsel? It implies of course that the Court envisions the meaning of counsel in one way—in terms of a paradigm of an adversary system, while the world of reality operates in another. More importantly, it also implies that the protections that are imputed to the presence of counsel may disappear, or at least be attenuated, by the realities of the administrative system of justice. Finally it suggests that the sorts of consequences for law enforcement officials are likely to be different from the sorts of consequences often suggested by spokesmen for law enforcement, as well as by leading reporters and commentators on criminal justice in the United States.

Let me illustrate by citing Truman Capote's testimony in July, 1966, before the Senate Judiciary Subcommittee which was then examining the impact of recent Supreme

Court decisions on law enforcement. Regarding the effect that the *Miranda* decision would have had on the murderers in the now famous Clutter case, Capote testified that "any lawyer worth his salt would have advised the boys to say nothing. Had they said nothing, they would not have even been brought to trial, much less convicted." Capote was, in my opinion, twice wrong. First, there was ample evidence to convict Smith and Hickock without their statements, a point which both Professor Norval Morris and I have elaborated separately in book reviews of *In Cold Blood*. Second, although it is true that a lawyer worth his salt would have advised the killers to say nothing, their admonition would not have prevented the lawyer himself from interrogating his clients, and learning the facts. Such an examination is protected by guarantees of confidentiality, but the cross examination of a client by a lawyer can be extremely challenging. In this case, given his knowledge of the facts, the lawyer probably would have tried to arrange some sort of deal allowing his client to escape the gallows. In the case of the Clutter killers, partly because the evidence against them was so strong, and partly because of the enormous publicity accompanying the case he probably would not have succeeded. But it is one thing to assert that they never would have been brought to trial, and another to argue that they might not have made it to the gallows. They surely would have been tried and convicted, had *Miranda* been enforced.

It is that sort of misunderstanding that leads to statements that the requirement that the accused be informed of right of counsel before interrogation handcuffs the police. In a system that depends upon the plea of guilty for its operating life, in a system that is administrative rather than adversary, the defense attorney takes on the role of a quasi-judicial official and, in sociological terms, is coopted by the system. In this respect, the social controls upon the defense attorney may be informal, but they are very real. Unless he is part of the system, the defense attorney cannot function successfully in it. For the present, I will not argue whether

this outcome is good, bad, or indifferent. I am, however, prepared to defend the assertion that this is the way it is.

Search and Seizure

The system of justice without trial also has its effects, on earlier stages of the system, before the defendant obtains counsel. Here, too, in police organization and attitude, we observe the push and pull of administrative requirements exercising a force that is at least the equal of the formal rules laid down by the U.S. Supreme Court. For the remainder of my talk, I shall analyze three decisions of the Court in the search and seizure area in light of the way the criminal justice system actually operates, to show how the Court is *not* controlling the police. These decisions are *Mapp v. Ohio*, which imposed the exclusionary rule of evidence upon states that did not already subscribe to it; *Ker v. California*, which held that the exclusionary rule had as broad a reach upon State and local police as on federal; and *McCray v. Illinois*, which permitted the prosecution to keep secret the identity of informants whose information had allegedly established probable cause to arrest.

Let us begin with *Mapp*, which imposes the exclusionary rule—doubtless the most celebrated judicially imposed device for enforcing police lawfulness. The exclusionary rule has been defined simply and precisely by Professor Francis Allen as follows: "Evidence obtained from the defendant in violation of his constitutional rights to be free from unreasonable searches and seizures will be suppressed by the order of the court."

The rule originated in the federal courts with the cases of *Boyd v. U.S.* and *Weeks v. U.S.* decided by the U.S. Supreme Court in 1886 and 1914, respectively. In 1955, the California court, in *People v. Cahan* overturned its long established law and adopted the exclusionary rule. Between 1914, when the Supreme Court decided *Weeks*, and in 1960 when it decided *Mapp*, only half of the American states had adopted the exclusionary rule. Of these, twenty appeared to have adopted

the rule without substantial qualification. Although these states included many of the most populace jurisdictions, New York state was not among them. As a result of the *Mapp* decision, announced on the last day of the 1960 term, all states are now required, by reason of the due process clause of the Fourteenth Amendment, to exclude from state criminal trials evidence illegally seized by state officers.

Why is there an exclusionary rule? From the point of view of the courts, probably the best statement of the assumptions behind the rule as a control device was made by California Judge Robert Traynor in deciding *People v. Cahan;* "Granted that the adoption of the exclusionary rule will not prevent all illegal searches and seizures, it will discourage them. Police officers and prosecuting officials are primarily interested in convicting criminals. Given the exclusionary rule and a choice between securing evidence by legal rather than illegal means, officers will be impelled to obey the law themselves, since not to do so would jeopardize their objectives." [44 Cal. 2d 443, 448]

I was able over a period of six months to observe police actually operating under the exclusionary rule, and I came to the conclusion that arguments about legal standards are usually couched in unrealistic language, whether the arguments come from civil liberties advocates or from law enforcement spokesmen. Each group tends to assume that judicially formulated restraints are going to have an important effect. The civil libertarian typically argues that tighter strictures ought to be placed on police by the judiciary, and that if they are, police correspondingly will feel an obligation to conform. This is the thrust of the Traynor reasoning. The law enforcement spokesman, who claims that the police are being handcuffed, makes a matching assumption when he argues that restraints on police behavior are already too severe. My own observations, in contrast to both these positions, indicate that informal norms that are located within police organization and culture are more powerful than court decisions in shaping police behavior; and that ultimately it

it is the process of interaction between the court decisions and police culture that accounts for how police behave and are affected by judicially imposed restraints. Now, such an interpretation does not deny that legal rules have an effect, but it does suggest that the language of the courts is mediated by the organizational structure and perspectives of the police. I would like to elaborate this further by briefly analyzing aspects of the policeman's situation which shape his behaviors and attitudes toward the exclusionary rule.

Let us begin this discussion by considering a situation where a narcotics officer observes a known addict making a subtle bodily movement, a movement that indicates to the policeman that the man is carrying some narcotic or drug in violation of the law forbidding the possession of narcotics. Of course, the policeman would prefer to have any seizure he makes be accepted as evidence in court. But whether it is or not does not determine his decision to search the suspect. His reasons for selecting criteria for search are numerous. First, and above all, the policeman sees his job as ferreting out crime. The idea that the policeman should be alert, vigilant, on his toes to the possibility of crime, is a fundamental craft requirement of the policeman. Later on he might try to figure out what the suspect did which might have legally justified a search. But a policeman would ordinarily feel embarrassed to report to his superior or colleagues that he had, for example, hesitated to search an addict on the street because he had first to meditate upon the addict's legal rights; and that because of his own hesitation, the addict had in the meantime escaped or had disposed of the incriminating evidence.

It is part of the policeman's job to locate and confiscate illegal substances. Thus, even if the search revealing possession of an unlawful weapon or unlawful narcotic was conducted not as an "incident to an arrest," the policeman will still have done part of his job simply through the act of retrieving the gun or narcotic. If the policeman did not conduct the search, he would not only have failed to gain a conviction, but he would also have missed collecting dangerous objects

or substances. From the point of view of the policeman, nothing but good can come from a search that's legally defined as unreasonable, provided that the search coincides with the normative assumptions of a police organization about reasonable search.

Now, what kinds of assumptions do police organizations have about reasonableness? Basically, the police would like to have greater freedom to make searches that are *not* "incident to arrest." That is, they would like to be able to search first, and then arrest on the basis of incriminating evidence disclosed by the search. Constitutional interpretation has not accorded this liberty to the police. As Professor Caleb Foote stated the law of arrest a few years ago: "In the law of arrest and by long constitutional history, reasonable has been interpreted as the equivalent of probable cause. An officer acts reasonably if, on the facts before him it would appear that the suspect has probably committed a specific crime. This is the context in which the word is used in the Fourth Amendment and most state arrest laws. Our cases sharply distinguish the reasonableness of an arrest on probable cause from unreasonable apprehension grounded on 'mere suspicion.' "

So let's get back to the policeman, given this kind of legal structure. He has to bear in mind the obligation to fulfill the search and seizure requirement, and consequently his strategy is to locate as many conjuries of events as appear to fulfill the mandate of these requirements. As a result, the policeman sees his job not simply as requiring that he arrest where he finds probable cause. In addition, he sees the need to be able to reconstruct a set of complex happenings in such a way that, subsequent to the arrest, probable cause can be found according to constitutional standards. In this way, as one district attorney expressed it to me: "The policeman fabricates probable cause." By saying this, the prosecutor did not mean to suggest that the policeman is a liar, but rather that he finds it necessary to construct an *ex post facto* description of the preceding events so that these conform to

legal arrest requirements, whether in fact the events actually did or did not occur at the time of the arrest. It is in this way that the policeman respects the necessity for complying with the arrest laws. His compliance, however, may take the form of post hoc manipulation of the fact rather than a true description of "before-the-fact" behavior.

Let me offer another illustration of this. In discussing the administration of criminal justice in the United States in an article in *The Saturday Evening Post*, Martin Mayer writes: "Prior to *Mapp*, narcotics users and pushers were almost universally convinced that if they weren't caught with the stuff on them they couldn't be convicted; when they spotted a plainclothesman approaching, they would throw the envelopes on the ground. In court, though, the policeman would merely testify that he had seen this defendant throw this envelope on the pavement; and the judge would convict. News of *Mapp* spread through the world of narcotics with astounding speed. Pushers and users stopped throwing the stuff away, and for the first time the police found that they had to search—quite illegally—to get the evidence. Fortunately, the judges had been hearing for years about envelopes thrown on the pavement (and were not very sympathetic with the *Mapp* doctrine, anyway); so the police continued to tell the same old story, and the prosecutors continued to win the same old convictions." [February 11, 1967, p. 78]

Former Assistant U.S. Attorney, Irving Younger, now a Professor of Law at N.Y.U., is more forthright. In an article entitled "The Perjury Routine," Younger says that such evidence is known, among defense lawyers and prosecutors as "dropsy" testimony. Under certain conditions, therefore, police testimony may be stereotyped, and hence perjured. Bear that in mind. It has everything to do with the *McCray* case.

Appearance of Compliance

Now, I am not saying that the policemen always lie, or never comply with judicial rules. Where the policeman feels capable of literal compliance, he does so. But if he sees the

constitutional law as a hindrance to his primary task of apprehending criminals, the task that has been laid out for him by the police department, he usually attempts to construct the appearance of compliance rather than to allow the offender to escape apprehension.

Of course, a policeman cannot walk up to a man in broad daylight and demand that he stand facing a wall with hands raised simply because the policeman has decided that to search every tenth citizen on mainstreet would be an effective mode of enforcing criminal law. But if the policeman can give some reason to his organizational superiors, including the district attorney, for conducting a search, in practice the worst punishment he can suffer is the loss of a conviction. If a search yields no incriminating evidence, those who are illegally searched are usually pleased to drop the matter. On the other hand, suppose something was found? Then the moral burden immediately shifts to the suspect. Even in the eyes of the judiciary, the illegality of a search is likely to be tempered by the discovery of incriminating evidence on the suspect. For example, when a suspect turns out actually to be in possession of narcotics, the perception of surrounding facts and circumstances about the reasonableness of the arrest can shift in only one direction, against the defendant and in favor of the propriety of the search, even if the facts might have appeared differently had no incriminating evidence been discovered.

The case of *Ker v. California*, which was decided by the U.S. Supreme Court in 1963, is often cited as a case that imposed restrictions on the police because it applied federal standards of legality to searches and seizures by state and local police. There is, however, an alternative interpretation that can be made of *Ker v. California*, which is to see it as a case that illustrates the tendency to affirm what is later found to be correct. The salient facts of the case are as follows: There was an informer's tip, plus some police observations, that connected Ker with specific illegal activities involving a known marijuana seller named Murphy. Police officers ob-

served Ker and Murphy conversing, but the officers could not tell whether anything had been exchanged between them. As Ker drove away, however, they recorded his license plate numbers. A check with the Department of Motor Vehicles revealed Ker's address. Officers were dispatched to his place of residence and then, as the Supreme Court's decision reads:

"They then went to the office of the building manager and obtained from him a pass key to the apartment. Officer Berman unlocked and opened the door, proceding quietly, he testified, in order to prevent the destruction of evidence, and found the petitioner, George Ker, sitting in the living room."

The method of entry was upheld, by a 5 to 4 decision of the Court. The dissenters, Mr. Justice Brennen, Warren, Douglas and Goldberg, argued: "Even if probable cause exists for the arrest of the person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home with or without an arrest warrant except (1) where the persons within already know of the officer's authority and purposes, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside, (because, for example, there has been a knock on the door), are then engaged in activity that justifies the officers in the belief that an escape or destruction of evidence is being attempted.

The dissenters' objections were answered by Mr. Justice Clark's opinion for the Court as follows: "Here justification for the officer's failure to give notice is uniquely present. In addition to the officer's belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's further furtive conduct in eluding them shortly before the arrest was ground for belief that he might well have been expecting the police. We therefore hold that in the particular circumstances of this case, the officers method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the state through the Fourteenth Amendment."

If one looks at the world primarily through practical lenses, the exclusionary rule is difficult to defend since it frequently denies the introduction of what would otherwise constitute perfectly acceptable evidence. But in my opinion *Ker v. California* may also be read to illustrate the persuasiveness of factual guilt and administrative efficiency over the principle of excluding illegally obtained evidence. The language used may be interpreted as a general tendency to give way to fact irrespective of how it has been obtained. Thus, I am suggesting that the Court itself might have voted differently in a laboratory situation that held all the preceding circumstances constant, but which showed the marijuana not to be present.

Now, if such tendencies are present in the Court, they are even more pronounced in the usual case where the police are involved. Here, the onus typically shifts to the suspect if he is found to have had incriminating evidence in his possession. The policeman has an upper hand under such conditions, even when his legal position is questionable. Especially in what policemen call "a small pinch," the policeman is not usually interested in arresting the man with a joint or two of marijuana, but in using him to turn in his supplier.

In that situation, the exclusionary rule may not appear very salient to the defendant. He may not be terribly aware of his rights, and he may be willing to cooperate with the police even though, under a strict interpretation of the exclusionary rule, the defendant might not have to engage in such cooperation.

That incriminating evidence is found is not lost on the defense attorney either. For him, too, the defendant comes to represent a less defensible client. It is possible that the attorney may decide to fight the case energetically on the search and seizure point. He might even win an acquittal for his client. But that is rare. Forget Edward Bennett Williams cast as the defense attorney, and Jimmy Hoffa as the client. The everyday, routine administration of criminal law would not even qualify as a "B" movie. Most cases are not appealed, and most attorneys and clients are faceless people. In an ad-

ministrative system where approximately 90 per cent of convictions are obtained by the accused's plea of guilty, that incriminating evidence was found may well influence the defense attorney to persuade his client to plead guilty. The defense attorney has a *de facto* guilty client and, even with the presence of the exclusionary rule, he may not be nearly as energetic in his defense of that client.

This tendency on the part of the defense attorney and also on the part of the police, is further accelerated when, as so often happens, the reasonableness of the arrest is a borderline judgment. Under such circumstances, the case typically will not go to trial and the exclusionary rule issue will consequently not be invoked.

The case of *Ker v. California* illustrates that what is legal and what is not legal in the search and seizure area is quite problematic. Now this problematic character of what is legal and what is not legal in turn encourages the police to test the meaning of due process of law. Suppose, for instance, we were to ask ourselves what kind of model we would set up for the conduct of police that was entirely in consonance with Supreme Court standards. In doing so, we would of course have to take into account the latitude accorded the police by *Ker v. California* and the extent to which that case and cases like it leave unresolved the legality of police conduct in particular cases. There are presently any number of practices utilized by the police that a dedicated civil libertarian would not regard as conforming to due process of law. On the other hand, it would not be at all unreasonable for law enforcement officials to feel, as regards these same practices that, to cite the words of Mr. Justice Clark, "Justification is uniquely present." Thus every Court ruling based upon the practical needs of the police as a working organization tends to reinforce the tendency to continue every questionable practice that can be justified in the name of expediency unless it has been expressly forbidden.

Finally, the worst that can happen to the individual policeman for an illegal search is a loss of a conviction as the result

of the exclusionary rule. But his superiors within the police department will be in sympathy with him provided the search was administratively reasonable even if the officer did not have legal "reasonable cause" to make an arrest. Furthermore, civil suits for false arrest are notoriously difficult to prove.

The McCray Case

That was the legal control of police scene until March 20, 1967, when the U.S. Supreme Court decided the case of *McCray v. Illinois*. In this case, McCray was arrested and searched by two Chicago police officers at about 5:30 a.m. on January 16, 1964. The officers had neither an arrest nor a search warrant. A package containing white powder was found on McCray's person and was seized by the officers. It was stipulated that the white powder was heroin. Prior to his trial, McCray filed a motion to suppress the narcotics seized during the search. At the hearing on this motion, the arresting officers testified that on the night in question they had been told by an informant that McCray was selling narcotics in the vicinity of the arrest scene and that the petitioner had narcotics on his person. One of the officers testified that he knew McCray as a person referred to by the informant, because he had arrested McCray on previous occasions. He also testified that he had known the informant for about a year, had talked to him frequently and had obtained from him information that resulted in numerous arrests and convictions. The other officer testified that he had known the informant for five years, and had talked to him concerning narcotics about 50 times, and had used his information in making numerous arrests and in securing numerous convictions.

When the arresting officers were cross-examined, McCray's counsel tried to learn the name and address of the informant referred to by the officers. The prosecution objected to these questions, and the objections were sustained by the trial court. As a result, McCray's motion to suppress the evidence was denied, and over his objection the heroin was introduced

in evidence against him in the trial. McCray was found guilty of the unlawful possession of narcotics and sentenced to two years imprisonment. The Supreme Court of Illinois affirmed the conviction, holding that on the testimony given at the hearing, the police officers had probable cause to arrest the petitioner, and thus to conduct the search incident to that arrest. The Illinois court also held that while McCray's right of cross-examination was limited by his not knowing who the informant was, the right of full cross-examination "must give way in the face of a compelling policy to protect informants in the stealthy and vicious traffic in narcotics."

The McCray case presented two questions for the U.S. Supreme Court. One was whether the police acting without a warrant had probable cause to arrest and search; and second, whether the prosecution was required by the Constitution to identify or to produce the informant.

The U.S. Supreme Court, in another 5 to 4 decision, upheld the reasonableness of the search. More importantly, the majority opinion said that the prosecution was not required to identify or produce the informant whose testimony made the search reasonable. In the decision, the Court states that, "the arresting officers in this case testified, in open court, fully and in precise detail as to what the informant told them and as to why they had reason to believe his information was trustworthy. Each officer was under oath. Nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury."

Now my interpretation is a little bit different. I think that the issue in McCray was not whether the trial judge was required to assume that the officers were committing perjury; it was whether the defendant was to have any means of checking whether they were. The McCray case, in practical terms, does away with whatever relatively slight inhibitions the exclusionary rule formerly put on police. If police catch a known pusher with narcotics in his possession, they very well may testify that they had probable cause based on the testi-

mony of a reliable informant. They may do so not only when the informer, was, in fact, not reliable but when there was, in fact, no informer. (Recall the "dropsy" testimony of the New York police.) As the dissenters say, "Unless the informant is produced, the Fourth Amendment is entrusted to the tender mercies of the police. What we do today is to encourage arrests and search without warrants. The whole momentum of criminal law administration should be in precisely the opposite direction if the Fourth Amendment is to remain a vital force."

Now, whether or not one wants to use such a sarcastic phrase as "tender mercies of the police," the fact remains that what the McCray case has done is to have made even more elastic the rubber handcuffs that the exclusionary rule formerly imposed. At present, the police are virtually free to make searches, and if they come up with evidence, they can make an *ex post factor* construction of probable cause. I am therefore in full agreement with the dissenters when they say that the McCray decision undermines the Fourth Amendment as a vital force.

And I would go even further. In *Justice Without Trial*, I ended the chapter that describes police work under the exclusionary rule as follows: "Constitutional guarantees of due process of law do make the working life and conditions of the police more difficult. But if such guarantees did not exist, the police would of course engage in activities promoting self-serving ends, as does any agency when offered such freedom in a situation of conflicting goals. Every administrative agency tends to support policies permitting it to present itself favorably. Regulative bodies restricting such policies are inevitably viewed with hostility by the regulated. Indeed, when some hostility does not exist, the regulators may be assumed to have been 'captured' by the regulated. If the police could, in this sense, 'capture' the judiciary, the resulting system would truly be suggestive of a 'police state.' "

It seems to me that the exclusionary rule has had a greater impact on the Supreme Court than on the police. A reading of

the decisions since *Mapp* seems to reveal a progressively less restrictive view of the policemen's ability to make a valid search. At the same time, because we are dealing with an administrative system, police lawlessness was not significantly affected by the initial 1961 decision. Thus, not only has the Supreme Court not handcuffed the police, but the police have begun to capture the judiciary.

Once we see the system of criminal procedure in its true administrative character, then we begin to raise new questions about control of police. To what extent can we depend upon the courts to control the police? I would suggest very little. When an appellate court rules that police may not in the future engage in certain enforcement activities, since these constitute a violation of the rule of law, the inclination of the police is typically not to feel shame but indignation. The police tend to rest their moral argument on grounds that the social distance of the courts constitutes a type of government—by the courts—without the consent of the governed—the police. Thus, the police see the court's affirmation of principles of due process—to the extent that the court does make such affirmations, as the creation of harsh working conditions. And like all workers, they tend to figure out systematic means for evading rules and sanctions especially by remote authorities.

Five Lines of Strategy

In attempting to police the police, therefore, I would suggest five lines of strategy:

1. It is extremely important that we understand reality and stop pretending that the courts can be anything more than a generator of ideals. Our problem then becomes one of how to infuse these ideals within the administrative structure of police organization. If we pretend that the courts are an effective check upon police misconduct, then we may overlook this misconduct in our own desire to affirm the adequacy of our judicial procedures.

2. It is important, therefore, that we take on the task of

reshaping police culture through police organization. This task requires that we devise means for breaking through the insularity of police organization. I have two unoriginal suggestions that I think are critical. The first is that we allow for lateral entry within police organizations. Right now, we can't hire in any one police department a man from another police department unless we start the new man at the bottom. The only exception is in the hiring of police chiefs. The situation is analogous to allowing people to be hired at universities as associate professors only if they had taken their doctoral work and had gone through the ranks in that university. Imagine for a moment how dismal the university scene would be if inbreeding was the fundamental and unshakeable norm for the acquisition of personnel. This is the situation that currently prevails in most police departments across the country.

3. There must be a dramatic raise in police salaries. According to Arthur Neiderhoffer, in 1940 half the entrants to the New York City Police Department were college graduates. But in the 10 year period between 1953-1963, just over two percent of the entrants had achieved this level of education. Neiderhoffer points out further that the college graduates of the 1940 class are the present professional elite of the New York Police Department, who generate ideals of constitutional democracy. But they are engaged in a battle with the old guard, and the old guard is being invigorated by younger conservatives who do not share the ideology of the college graduates. Lateral entry is related to police salaries in an obvious way. If police departments are forbidden to compete with one another for middle level personnel, salaries are necessarily diminished. Again, it is as if assistant professors (substitute sergeants) could not entertain offers to become associate professors (substitute lieutenants). Although there is a tremendous shortage of police throughout the country the system of vertical entry depresses salaries enormously.

4. To the extent that we want to control police activities through sanctions, we must impose sanctions that are stronger

than depriving the police of a conviction. This deprivation of a conviction is not a very serious sanction if the organization really doesn't care whether the policeman gets the conviction or not. And in many cases it simply does not care. If a policeman harasses or assaults an individual on the street, that misbehavior by the policeman may or may not be salient to the police organization. The insular character of police organization makes of police an organization that is especially incapable of self control. I certainly think that there should be an external review of police activities with direct sanction, on policemen. I also believe that as a general matter there ought to be an external review of all governmental activities, because bureaucrats in general tend to be defensive and followers of the principle of self help. In all bureaucracies there tends to develop an idealogy of see no evil, hear no evil, and speak no evil of your fellow bureaucrat. Under such conditions it is extremely difficult for the citizen to gain redress.

5. Many of the misbehaviors of police are the result of failures on the part of the legislature. It has become a cliche to say that social problems cannot be treated through the criminal law. Yet despite the hackneyed character of that assertion, in fact illegalization seems to be the principal legislative response to certain kinds of social problems, e.g., drug use, gambling, prostitution. When the legislature makes these activities a crime, it opens a Pandora's box of police misbehavior. It invites police corruption. Thus, several members of the New York City Vice Control Squad are under indictment along with state and federal officers for selling drugs. These men are all specially selected, carefully selected for their confidence and honesty. It invites a disrespect for constitutional legality. In an administrative system where the police are under pressure to produce, "dropsy" testimony becomes a cynical appendage to the system. By making criminals of large numbers of people the attempt to control social problems through criminal law creates crime where it need not exist and creates a conception of a society that is in great crisis. Much of our crime in the streets has been created by

our legislatures. Much of the crime that is committed by narcotics addicts who steal to get drugs is crime for which our legislatures bear criminal responsibility. And much of the misbehavior of the police can also be traced to the politics of criminal law legislation.

Finally, the police themselves are a politically sensitive and increasingly right-wing bureaucracy. Change the politics of the country, and you will change the behavior of the police. When the country is ordering priorities in such a way that vast resources are drained from our critical urban needs to the fighting of a senseless war, the police become increasingly repressive. Ultimately, we get the sort of police that we deserve. If we, the citizens, view policing as a dirty job and beyond our responsibilities, we invite dirty policing. If we, the citizens, are reluctant to pay police, we invite police corruption. And if we, the white citizens, demand the economic and social strangulation of the black citizens in the choking ghettos of our cities, the police will help us. Ultimately, the police will move as we, the people, want them to move.

THE ROLES AND DILEMMAS OF COUNSEL IN CRIMINAL JUSTICE

Ronald L. Goldfarb

IT MAKES FOR GOOD RHETORIC and for high-sounding, principled lecturing, in dealing with a subject such as the roles and dilemmas of trial lawyers in the criminal justice process, to talk in sweeping and impressive generalities. But this is of little assistance in guiding the practicing attorney or guiding his proper critics in society with respect to the infinite decisions that must be made by the trial lawyer in the course of any criminal case.

One of the reasons for the confounding nature of the problems of professional ethics among the trial bar is the fact that trial lawyers serve many different masters and operate with many different motives.

A trial lawyer is responsible to himself and is guided by his own personal code of ethics; he also is an officer of the court and responsible in some general way to the administration of justice, no matter who his client is; similary, he is a licensed member of a professional fraternity and must live by its standards of conduct.

Furthermore, trial lawyers all march to the tune of drummers of their own.

There is a story, worth repeating, that centuries ago a curious passer-by questioned three stonemasons who were working on the construction of the magnificent cathedral at Chartres. He asked the first what he was doing, and the laborer

replied, "Piling stones." The second said that he was "earning a living." The third answered, "Building a cathedral."

Individualized estimations of one's work apply to the trial bar as well. Trial lawyers—be they defense counsel or prosecutors—do what they do for all kinds of reasons that undoubtedly affect the way they do their work. Some are doing it because it is there to be done, some are simply earning a living; and some care especially about the administration of criminal justice and the search for truth amid conflicts. Some are moved by combinations of these motives, which themselves may conflict.

Context of Perspectives and Demands

Therefore, before entering any discussion about the proper roles and the difficult dilemmas of the criminal trial lawyer, it is necessary to recognize that any decision about a real, specific issue of conduct must take into consideration the whole context of broad, and sometimes conflicting, perspectives and systematic demands that go into each determination to pursue a certain course. Some of the questions that must be faced are:

1. What are the purposes of the legal profession and of trial lawyers especially?
2. What are purposes and the nature of the adversary system?
3. How does one reconcile conflicts between the sometimes competing demands of morality and the quest for truth?
4. How are the mundane, snap-judgment, day-to-day realities during the course of the trial process brought into conformity with the theories that are supposed to guide the participants in this process?
5. To whom is the trial attorney responsible, and how does he balance his obligations to many masters when, as is often the case, he is in this predicament?
6. How does the trial lawyer follow the guidelines of ethics, morality, tactics, and techniques when he has only his

conscience and general principles to guide him?

These questions may sound naive when stated by a lawyer whose very profession puts him in the role of custodian of a process that concerns itself with the resolution of these very essential issues and presupposes some sophistication. But when I began to address my thoughts in an organized fashion to this subject, I found it rather easy to "spot the issues," as we were trained to do at Yale Law School, and to enunciate broad and general principles that I have learned and deeply feel concerning these issues. On the other hand, I found it almost impossible to suggest answers to these questions in any useful and helpful way—indeed in any way that was more than a personal, subjective value judgment.

You and I, and no doubt everyone else, might be quick to agree to the principles of trial advocacy, in the day-to-day, real decision-making process trial lawyers go through: (a) these issues often are not even evident at the time we are making these crucial decisions; (b) we have little real guidance in making these decisions when we do recognize the issues; and (c) even when we do recognize the issues and do have some standards to guide us, the decisions are still agonizingly difficult and evasive, and very often require God-like judgments for which—while perhaps many of my brethren of the bar dispute this—lawyers have no peculiar talent, training, or access.

Two Impressionistic Relations

Let me share with you two impressionistic relations which I experienced, first as a defense counsel and later as a prosecutor.

My first trial practice as an attorney was in the Judge Advocate General's division of the Air Force, where I defended numerous courts martial. I conducted my work, I am sure, with care and consciousness about the ethical standards relating to my responsibility, but with tremendous zeal for the opportunity to be a trial lawyer for the first time and to be successful at it. I was successful and I won many cases,

including several which by judicious standards, I no doubt should have lost. At first I felt no pangs of remorse about my success because I was simply meeting the government's case with all the competence I could muster and fulfilling a role according to the prevailing rules, which in any event were not of my creation. But after a while—in fact in the middle of my summation of one case—I felt strong, personal qualms about what I was doing. Even while I was on my feet arguing, I was asking myself, in a quiet private part of my conscience, very skeptically and cynically, "Just what is it you are doing?" I believed I responded very confidentially to myself that I was doing nothing wrong according to the rules of the game; but all of a sudden I did not like what I was doing. Perhaps I was not finding fault with the player, but just with the game. But the player can only rationalize so long, and then he must decide whether to participate in the game about which he has such qualms.

I had a parallel feeling years later when I held a position as a special prosecutor in the Department of Justice's Organized Crime and Rackets Section. There again I had made a moral decision that the general purpose of my work was noble and social-serving, important and right. I also was scrupulously sure not to exceed the bounds of proper prosecutorial zeal. I had little compassion for those organized criminals whom I was prosecuting, and I had a proud feeling about my part in this important work. And yet, there were moments when—in the course of a trial or a grand jury proceeding, while I was questioning a hostile witness—that same devil-angel spoke to me again raising the same question, "Just what are you doing?" While I was confident that I was following the rules of the game and fulfilling my role for an important client, the people of the United States of America, and while I knew that dastardly deeds had been perpetrated, I admit to having had occasional sinking feelings about some of the perfectly legitimate and open steps I had to take, such as forcing frightened witnesses to testify and thereby jeopardizing their safety, or in prosecutorially pursuing peo-

ple whom we were not really after but who were inevitable steps along the way to bounty we sought. I was not comforted by the adage, "You have to break a few eggs to make an omelette." Nor was I able simply to ignore this inner feeling through the rationalization that I was, after all, quite clear about the greater good that I was doing.

Complexity of Decision-Making

The point that I wish to make is that the decisions of the defense lawyer and prosecuting lawyer in the judicial system are terribly complex and often excruciatingly difficult.

What makes this professional quandary perhaps more difficult than the everyday, equally vital decisions that surgeons, statesmen, engineers, and soldiers must take, is the fact that lawyers do not have any monopoly on honesty, principle, or truth; nor do they have any special skills or training to enable them to make these decisions properly. The judgments that these other professionals make derive from skills that may be learned. A surgeon knows how to conduct a gall bladder operation, or he does not dare to conduct it. An architect knows the regulations when he builds a house; he may or may not build closer than fifteen feet distance to the street. But the trial lawyer has very few objective criteria to follow in making decisions of the kind he encounters in countless situations like those in the illustrations that I am about to describe for you. Granted, if a case must be filed according to law within thirty days from the time of an ascertainable incident, there is little room to err in deciding when to bring that case. But when the issue is whether to choose trial by jury or trial before the judge, or which jurors to choose and which to challenge, or which person to believe and which not to believe, or how to present a case in the most effective way, or how to cope with your confidential information about a case when it conflicts with the public's knowledge of that case, standards of decision become very personal and subjective and evasive.

A lawyer has personal standards as well as rules of the

courts to guide him and bar codes of ethics to follow. But these again provide the most general guidelines, which treat the obvious but do not solve the difficult. Codes of ethics speak in such generalities as to be, in many cases, meaningless. For example, one Canon states that an attorney "should strive at all times to uphold the honor and to maintain the dignity of the profession and to improve knowledge of the law, and the administration of justice." Think whether this answers any of the illustrative problems I am about to describe. Another Canon states that "when a lawyer discovers that some fraud or deception has been practiced. . . . he should endeavor to rectify it . . ." Yet, a number of notable attorneys, public officials and law professors in Washington, D.C., all agreeing with this principle, recently engaged in a heated, public debate about the responsibility of the defense counsel who knows his client is lying under oath. Earnest, scrupulous, experienced well-motivated and distinguished minds disagreed in their responses to this many-faceted, very real question—but all agreed with the Canon.

Illustrations of Dilemmas

To illustrate the kind of every-day, distressingly difficult dilemmas that a trial lawyer encounters, let me give you some illustrations. At the end of each example I shall ask you to indicate whether or not you would have agreed with some judgments that had to be made in the course of very real, live situations during the course of several criminal trials. Let me add that you should be guided in your judgment by the same general principles which I assure you guided the particular trial lawyer who had to make these decisions. First of all, in every case, you want to act with the utmost, scrupulous, utter integrity which in your judgment is possible under the circumstances. Second, in those cases in which you are defense counsel, you are motivated by an intention to do everything possible, but proper, for your client's well-being; and when you are a prosecutor, you have similar feelings about the government you represent.

Illustration No. 1. I once prosecuted a case in which my key witness had a known history that created a bleak impression of his veracity and credibility. Nonetheless, in the course of preparing this case—this time I was a prosecutor—I satisfied myself that with regard to the matters about which the witness would be testifying, she was telling the truth. In order to win my case, her testimony was critical. I was anxious to secure a conviction, because I thought the defendants were evil people who had done reprehensible things; and I was aware of the tremendous effort and cost to the government in preparing this case. One of the steps that I took to corroborate my impression of this witness's veracity was to subject her (and she agreed voluntarily) to a lie-detector test by the best polygraph expert available to me. She was asked key questions centering on her testimony, and the polygraph expert concluded that her responses indicated truthfulness.

Evidence of the results of lie-detector tests are inadmissible in courts because the courts are skeptical about the scientific accuracy of these tests and because juries would be likely to give undue credence to this kind of evidence. I myself have listened to persuasive arguments pro and con about the validity of these tests and tend to find myself believing the last persuasive expert whom I have heard. However, while lie-detector evidence may not be submitted by the prosecution at the risk of causing reversal or mistrial, testimony about these tests may enter the record so long as it is not at the instance of the prosecutor.

For obvious reasons I was anxious for the jury to know that this witness, whose credibility undoubtedly would be attacked viciously by the defense, had been corrobrated by the polygraph expert.

With all these considerations in my mind, I carefully instructed the witness prior to the trial that she was not to mention anything about her test when she was questioned by me for the government. I explained why, and I also explained to her the rule that would permit her to mention the test

should the area be opened up by the defense. I gave her examples of the questions she would be asked and indicated which would and which would not allow her to respond to the cross-examination with testimony relating to the lie-detector test.

We went through her testimony at the trial, and neither she nor I mentioned anything about the test. When she was questioned by the defense, every collatoral facet of her background was raised that in any way could cause a slur upon her veracity, whether or not—in most cases, not—these matters had anything at all to do with the case at trial. Sure enough, at one point during the cross-examination, in a heated exchange between the witness and the defense counsel about a particular incident contentiously at issue and crucial to the case (and by the way a question about which she was asked during the lie-detector test) the defense lawyer in a moment of very unwise tactics, blurted out a question directly asking the witness whether or not she had ever testified in this manner during a lie-detector test. Coolly, dramatically, and to my partisan eyes beautifully, she paused, looked over to jury and said, "Yes, I was asked this question during a lie-detector test which I was given at Mr. Goldfarb's request by the FBI. I answered the same way and I passed." There was a conviction in that case, and no one will ever know (although I have a distinct impression) how decisive this little tidbit of inadmissible evidence was with the jury. I candidly admit that I hoped this would happen; indeed, it was my tactic in preparing this witness. Did I do wrong?

Illustration No. 2. In the course of my prosecution of a case, an investigator told me that he had had a conversation at a critical time with a certain person who had told him certain things which would have been very damaging to a defendant then at trial. Obviously, the defendant could not be relied upon to provide this testimony; nor could I ask the party to whom the defendant told these facts, as he was hostile to the government and was himself of unreliable

veracity, a suspicious person for whose general credibility I would not vouch. I could have had the benefit of this evidence by putting on the investigator to testify what the third party told him that he was told by the defendant. However, this would have been hearsay evidence, and, if objected to, would have been ruled inadmissible. But the rule of evidence which guided me states that hearsay evidence, while inadmissible, is not incompetent, and if not objected to, may be accepted in evidence.

I told the investigator that I was going to put him on the stand to question him about this conversation. He strenuously objected on the ground that, as an investigator, he would be embarrassed by disclosing his sources of information, and because he thought I was asking him to do an immoral thing. I told him that he should take the stand, listen to my question, give the defense an opportunity to object before responding, and if there was no objection, to testify. I eventually decided not to use this witness, but if I had, would I have been wrong?

Illustration No. 3. The evening before a very important trial in which I was the prosecutor I was advised that a witness could provide me with crucial evidence that would have incriminated one of the defendants against whom our evidence was, while adequate, relatively weak. I was told that the witness was so upset and afraid to testify that she had committed herself to a hospital for the mentally disabled. On the eve of the trial, with the permission of the responsible medical authorities, I visited this bleak and depressing place and spoke to the witness, who was in a highly agitated, obviously unhinged state. I pressed the witness to testify, advising that there was no alternative. I was told that if I did this, she would commit suicide. I needed her testimony. I had compassion for the witness, as I did for many others who were involved in this case and whose peace and well-being were in even more direct jeopardy as a result of the trial. I decided not to use this witness. The defendant who

would have been incriminated by this witness's testimony was aquitted. Did I do wrong?

Illustration No. 4. This is a hypothetical example. Frequently, prosecutors in organized crime cases are criticized for going after defendants and eventually indicting them for secondary offenses, like income-tax evasion, because they were not able successfully to prove the more serious crime. Suppose the prosecutor has evidence from reliable sources indicating that an individual runs a criminal syndicate and is the decision-maker, if not the actual doer, of many grave crimes. Should he make a concerted effort and use a disproportionate amount of his facilities and energies to prove this simply because in his value judgment this is what he, as a public prosecutor, ought to do? And, if after an exhaustive investigation, he is satisfied that his impressions were correct, but he cannot prove it (because witnesses are afraid to testify or because his evidence, though competent, is inadmissible, or for other reasons of this kind), is it wrong for him in effect, to create a stilted version of the case with the evidence he has, assuming, of course, that the evidence is real and that it does add up to a crime? Arguments have been made that it is wrong for a Robert Kennedy to "go after" a Jimmy Hoffa, or for an Al Capone to be convicted for income-tax evasion. On the other hand, it is argued that no noncriminals are susceptible to having criminal cases presented against them, absent fraud, and that all prosecutors must decide which areas within their jurisdictions, demand the most concentrated time and effort. What do you think?

Illustration No. 5. Another standard complaint made against prosecutors involves the period preparatory to the trial. Prosecutors traditionally have been accused of manipulating grand juries, making God-like decisions as to which cases should and should not be brought, and setting up phony charges in order to advance their bargaining position for negotiating pleas. In my opinion a competent prosecutor can eclipse the independence of a grand jury and present and handle cases before them in such a way as to predetermine

what course the grand jury will take. This exercise of executive discretion has been labeled abusive.

What of the prosecutor who indicts a man for murder, when he is convinced the defendant murdered the victim, but he knows full well that he can only prove a simple assault? Is he protecting the public or abusing an individual when he indicts a man for murder only to assure his chance of obtaining a plea to the lesser charge? If you feel that it is heavy-handed for the prosecution to toy with the system in this fashion, how do you feel about the case in which the federal government indicts a Klansman for the misdemeanor of interfering with a civil rights worker's constitutional rights when, in fact, the incident involved murder, and the state officials with primary jurisdiction failed to obtain a murder indictment or conviction? Was the second prosecutor correct in indicting the Klansman for a misdemeanor? What do you think?

Illustration No. 6. A defense lawyer represents a man charged with rape. The accusing victim is a young, impressionable girl from a reputable family who, investigation shows, has had isolated affairs in the past. While defense counsel is charged with challenging the prosecution's case in the most effective way for the benefit of his client, he is convinced that his client raped the girl. Nonetheless, after she testified, he vigorously cross-examined her, attempting to dispute facts in her testimony which he knew to be true and damaging her irrevocably by bringing out facts about her prior sexual affairs in order to discredit her present testimony. Has he done wrong?

Illustration No. 7. Did the lawyer in *Anatomy of a Murder* do wrong by advising his prospective client in a murder case, before the client could say anything to him, of what the law was in that jurisdiction? The charges and known evidence in that case were enough to convict him for murder, but he was advised in a general way that the law would recognize—if that was the case—a certain defense if certain things could be shown. He told his client to think it over, as you may re-

call, and to meet with him to discuss the case in detail the next day. Lo and behold, the next day the defendant described the incident to his lawyer in such a way that if his statement was believed, he was eligible to raise this very defense to the murder charge. Did that lawyer do anything wrong?

Illustration No. 8. In the course of a murder case that I defended—one in which I was totally convinced of the innocence of my client—a confession was offered by the prosecution. Based on my conversations with the defendant and others, I had no doubt about the voluntariness of this confession and thereby its admissibility as evidence. My defense in the case presumed all of the facts in the confession and went towards other issues.

Before a confession may be offered, a foundation has to be laid by the prosecution establishing the voluntariness of the confession. The prosecution put a witness on the stand, laid this foundation, and asked the court to admit the confession into evidence. I asked to cross-examine the witness, not because I questioned his testimony and not because I did not want the confession to get into evidence, but only to give the witness a light once-over and to probe and possibly unearth some tangential facts that I did not know. I asked the witness, who was a big, fat, jolly, genuine, overly earnest man, a few questions about the circumstances of the extraction of the confession aimed at questioning its voluntariness: Were any promises made? Were any threats made? Was the defendant struck? Was he deprived of a civil environment during the questioning? I asked these and other such questions. To each of these questions, the witness, who displayed shock at either the possibility or the insinuation of such happenings, replied in every instance in a very defensive manner, "Ab—so—lute —ly not!" While I was sure that he was telling the truth, he sounded so dishonest and unbelievable in the way he responded that I could observe a reaction of the jury, spectators, and even the judge. I continued to ask him a whole series of questions just like those I described, all questioning

the voluntariness of the confession and the circumstances of its extraction, and all calling for answers which I could then anticipate but which really did not help my client: "Ab—so—lute—ly not!" But in eliciting these same responses, which I knew were hurting the witness and the prosecution, I was casting doubt on the legitimate parts of the prosecution's case. When the questioning was over, while the witness did not change his testimony, and while no helpful evidence for our cause was admitted, the witness was demolished and left an impression of unbelievableness and a lingering hint that there might have been nefarious conduct on his part. The confession was admitted. We won our case, as we should have. But did I do anything wrong?

These examples are by no means intended to exemplify the infinite range of instances, in the course of a criminal case, in which decisions like these need to be made by counsel on the spur of the moment. No doubt, even as we present these few illustrative episodes, each specific issue gives rise to various other peripheral ones. No doubt in the course of a single real case, one could be provided with enough issues to fill a book on professional ethics.

Ombudsman for Legal Ethics

I wish I could sum-up this discussion with some all-embracing, sage conclusion that might serve as a useful formula for future decision-makers; but I have none. No doubt the great majority of the moral dilemmas of the prosecution and the defense counsel in the administration of criminal justice will, when all is said and done, have to be resolved personally by private uncorroborable and uncontrollable standards. Perhaps this is as it must be, but I do have one suggestion to submit with the thought that it might make a contribution toward assuring higher professional standards in the trial bar.

I think it would be an excellent idea for every city to have a public official, assigned to the chief judge in that area, who would be akin to a limited *Ombudsman* or a specialized inspector general, whose role would be to function aggressively

as the court's and the bar association's grievance committee. He should be available to give opinions about the propriety of proposed courses of action. He should be available to receive all complaints of alleged grievances against lawyers. He should himself, or through his aides, rove the courts in the community to detect questionable practices. He should meet regularly with public officials, community leaders and intensively with the bar in an effort to collate and define, refine and articulate as much as possible the infinite layers of ethical problems and issues encountered by the bar. He should make proposals to the organized bar and to the courts for rules or standards better to guide the conduct of the legal community. He should act aggressively as a prosecutor for the court and, where it is appropriate, decisively and aggressively take all proper steps to purge the bar of those who too long have spoiled the reputation of their profession and done significant social disservice to their communities with impunity.

INFORMING THE PUBLIC AND PROTECTING THE COURTS

Telford Taylor

We have come to talk about and think about the problem of pretrial publicity and the prejudice to a fair trial that may result. It isn't my main purpose to come out with any personal solution. I myself don't think there is any one solution. Certainly, if there is one, I haven't seen or heard it.

What I hope to do is to give an indication of the thinking that has been going on in this area in the journalistic profession and in the legal profession, and see if I can narrow down the area of discussion in a way that will be helpful later on.

Much of the initiative for the discussion of this problem today arose from President Kennedy's assassination and the ensuing events in Dallas. I think it important to remind ourselves that the problem didn't originate there. Indeed, if we think about legislative concern with this problem, the first occasion upon which a legislative body became deeply involved in the relations between courts and the press goes back in 1831, when Congress enacted the famous statute limiting the contempt power in federal courts. Judges can only punish acts that are committed in the presence of the court or so near as to amount to the obstruction of justice.

Except for a brief period when it was interpreted casually, the statute has been interpreted in terms of physical proximity. Therefore, in the federal courts it immediately put a

stop to any tendency to embrace the English system, which gives to the courts contempt power against journalists. That 1831 statute, however, was not the product of the same kind of problem that concerns us. It wasn't a case in which a judge was offended by pretrial publicity, or by publicity about a trial or anything of the kind. It was a case where one of his decisions was criticized in the press, and the judge, being a very vain old man, took revenge by putting the newspaper men in jail for contempt. This episode led Congress to restrict contempt powers in federal courts, so in this first confrontation between the journalistic profession and the bar, the journalists emerged the victors hands down. My own view is that they have had a pretty good batting average ever since.

Publicity and Prejudiced Juries

The danger that we are talking about here is that juries may be prejudiced to the point where a fair trial is difficult or impossible. The American Bar Association report, which many of you have seen, treats us to a little item out of the year 1846, which might just as well have been written today: "Ours is the greatest newspaper-reading population in the world. Not a man among us fit to serve as a juror does not read the newspapers. The usual question which has now been almost a necessary formality is our time—'have you formed or expressed an opinion?'—is virtually equivalent to the inquiry, 'do you read the newspapers?' In the case of the crime that has been widely discussed it is impossible for anyone of common intelligence and not secluded from society to be found who has not formed an opinion."

Well, I am not a member of the A.B.A. and, therefore, I am moved to cap this story with an even earlier nugget. Last spring we were all watching efforts of the trial judge in the Richard Speck case to put a jury together, while wrestling with the problem of publicity in that trial. I am sure that judge would have been very envious at the way a comparable matter was handled in 1842. A case which is very familiar to

every student of criminal law is the case of *United States v. Holmes*, which was tried in the federal district court in Philadelphia, in 1842. Supreme Court Justices then had to ride the circuit and try cases. This case was tried before Supreme Court Justice Baldwin. It is famous in criminal law because it is one of only two cases that squarely raise the problem of whether it is ever justified to take human life in order to save other people's lives.

This case involved the sinking of an ocean-going vessel carrying immigrants to America from Ireland and Scotland. The ship struck an iceberg off the coast of Newfoundland, just as the Titanic did years later, and foundered. Again like the Titanic, it did not have enough life boats for all the passengers and crew, and times perhaps being a little more rugged then, the vessel was left with about half the passengers on it and the rest of the passengers and crew in two life boats. One of these boats being overloaded, the captain ordered some of the crew to throw out some of the passengers to lighten the boat so that it would stay afloat. This was done. Shortly after this was done, the life boat's remaining passengers were picked up by another vessel and brought to Philadelphia. The relatives of some of passengers who had been thrown overboard took a very dim view of these doings and one of the sailors, (the mate and the captain, meantime, were safely off on another voyage) was brought to trial in Philadelphia on charge of manslaughter. The best thing to do is to read this short extract from the case:

"The trial of the prisoner came on the 13th of April, 1842, a few days before the anniversary of the calamities just referred to. The case was replete with incidents of deep romance and pathetic interest. These, not being connected with the law of the case, do not appear in this report, but had become known in a general way to the public before the trial. And on the day assigned for the trial at the opening of the court, several stenographers connected with the newspaper press appeared within the bar, ready to report the evidence to their expectant readers. Mr. Justice Baldwin taking his seat now

said, 'By an act of Congress passed some years since (that means the statute of 1831), the Court has no longer power to punish as for contempt. We have, however, the power to regulate the admission of persons and the character of proceedings of our own bar. And as the Court perceives several persons apparently connected with the daily press, whose object we presume is to report the proceedings in this case as it advances, the Court takes occasion to state that no person will be allowed to come unto the bar of the Court for the purpose of reporting except on condition of suspending all publication until after the trial is concluded. On compliance with this condition and not otherwise the Court will direct that a convenient place be assigned to . . . reporters of the press.' The reporters expressed their acquiescence in this order of the Court and the most respectful silence on the part of the press prevailed during the whole trial."

The press would not today quite so quietly submit to that kind of restriction. A very interesting article that I came across, written in 1911, uses the phrase "trial by newspaper," and one of the leading barristers of that time is quoted as favoring legislation to impose criminal sanctions on the press for publishing anything at all except a verbatim report of the proceedings in open court.

These old protests, vociferous as they were, did not lead anywhere except to the wailing wall. There have been in the last 25 years two episodes, prior to President Kennedy's assassination, that are worth a brief glance. Most of you know about the episode that gave rise to the first sustained consideration of this whole problem by the bar—the kidnapping and subsequent murder of the Lindbergh child. The abuses on that occasion, however, did not relate to pretrial publicity. The main problem was rather like the Billy Sol Estes case. It was before the days of television, but not before the days of photography. The trial was made a shambles by noise and clutter and motion. That was the main problem there, and the Bar Association recommendations were largely atmospheric and had to do with the exclusion of cameras from the

courtroom and similar matters rather than with problems of pretrial publicity. It was, therefore, anticipatory of things that the Supreme Court discussed in both the *Sheppard* and *Estes* cases; and I haven't much doubt that, if Hauptmann had been given a life sentence instead of capital punishment, and if he were alive today, he would have a good chance of getting out on *habeas corpus* and being given a new trial as Dr. Sheppard was.

In New York City about fifteen years ago, we had another less tragic trial, involving a young gentleman, named Mickey Jelke, of wealthy connections, who was charged with living on the earnings of prostitutes. This led to a very colorful trial in one of the New York courts from which the press was excluded because the testimony was deemed to be a little too rich, but on appeal the decision affirmed the right of the press to be present at trials. And again this trial stimulated the New York County Lawyer's Association to appoint a committee to consider the problem and make some recommendations.

The Warren Commission Report

These episodes pale in terms of public effect beside the assassination in Dallas, because that has had the effect of focusing public attention on the problem and the attention of the bar and the press in a sustained and intense manner far exceeding what had happened before. Therefore, whether one agrees or disagrees with what the *Warren Report* said about the trial, it was inevitable and natural that the *Warren Report* should advert to the whole problem of publicity, because everyone else was talking about it. Just to refresh your recollection, the Warren Commission distributed responsibility pretty even-handedly. They said primary responsibility rested on the police department. The Commission believed, however, that a part of the responsibility for the unfortunate circumstances following the President's death must be borne by the news media. It did not come to any conclusions as to what ought to be done, but it did end up saying, "It's up to you,

boys." State and local governments, the bar, the public and the press all ought to consider the matter and take steps to bring about a proper balance between the right of the public to be kept informed and the right of the individual to a fair and impartial trial. So, as usual, it's a little easier to state the problem than to solve it. And that's about all the *Warren Report* did.

Now I think you can see from this brief recapitulation of the past that public and professional concern with this problem has been highly episodic. What happens is that some particularly shocking episode starts a cycle of concern: you get a number of reports by bar associations; you get some cooperative efforts between bar and press to come to some kind of agreement; you get a cluster of articles about the matter.

This time, for reasons that I've tried to suggest, the concern has been deeper and more enduring. I would like to list the principal types of activity and developments that have followed in the wake of the assassination and the *Warren Report*. There has been, in the first place, specific court action which in some cases has taken the form of general court rules and in other cases rules for a particular case or trial. In New Jersey, the State Supreme Court in the *Van Duyne* case took occasion to announce some general rules about penalties against lawyers who wrongly reveal information about trials. The Speck trial and various other trials are illustrations of the *ad hoc* procedure, where a particular trial generates a particular rule for that occasion.

Then there have been a number of internal administration regulations by law enforcement agencies. The Department of Justice put out an internally enforceable code for the guidance of its employees. The U.S. attorney in Connecticut did the same thing. Then there are codes or guidelines that have been adopted voluntarily by various news media. The Columbia Broadcasting System has brought out a series of guidelines for its employees, not much different in approach and substance from the guidelines of the Department of Justice. The Toledo newspapers have done the same thing. Then there

have been various rules, both recommended and adopted, that have been generated by bar associations in particular cities.

Finally in the area on which I want to concentrate, there have been a series of institutional reports and recommendations of which the most significant have been published by the American Newspaper Publishers Association and the American Society of Newspaper Editors. On the side of the bar there has been the American Bar Association's Project on Minimum Standards for Criminal Justice, and the report that the association of the bar of New York City put out last spring, under the chairmanship of Judge Medina, "Freedom of the Press and Fair Trial."

Publishers' and Editors' Reports

I want to deal first with the question of the seriousness of the problem we are talking about. What is the magnitude of this problem? The nationally organized press and by that I mean the press speaking through such organizations as the A.N.P.A. and A.S.N.E., has taken a very dim view of the *Warren Report* and of its conclusions and recommendations. I will return to certain aspects of these reactions, but at the moment I want to deal with the theme that runs through both of these documents from the A.N.P.A. and A.S.N.E., and that is that this entire problem has been unduly inflated. The proposition takes two forms.

One is the question of whether jurors are in fact influenced by pretrial publicity. The suggestion is made that this is an unwarranted inference; that there is no proof that jurors do acquire a prejudice, or at least a damaging prejudice, from being exposed to pretrial information; that the idea that they are so influenced is a very unlawyer-like and unwarranted presumption. And the second branch of the argument is that in any event the number of cases in which pretrial publicity has been important is very small, both absolutely and in proportion to a whole volume of criminal trials. Therefore, we're being urged to guard against a danger said to be largely a figment of the overheated legal imagination: the jurors aren't

that much influenced and anyhow they aren't very exposed. One can find these views stated very clearly in both the publishers' and editors' reports. I must say that when I first began to think about this problem, that reaction came as a surprise to me, because, like most lawyers who have tried jury cases and who have been through a very protracted *voir dire* (that is to say the pretrial examination of jurors to ascertain whether they're eligible to sit as jurors), the effects of publicity seemed to me to be apparent. Sometimes this effect is vocal and specific on the part of the jurors, and sometimes it is a thing that is more easily sensed than articulated. This has seemed to me abundantly manifest in my own experience. But, of course, these things may come clear to a harassed trial lawyer, but they may not be at all clear to a newspaperman who starts with a very different slant on all this. And I think it is true that there is danger in taking too much for granted. There's much about jury processes that remains unknown. I think the legal profession has been prone to assume the magnitude and the actuality of the danger.

Now the American Bar Association report is backed, however, by a field study which has made what I would call a pass at this problem. That is to say, they sent a questionnaire to defense lawyers, and they got, as one might expect, a great many replies saying yes, publicity is a problem. But, of course, this is opinion testimony and it isn't proof. Dr. Frank Stanton of the Columbia Broadcasting System, in what I thought was a very sharp article, analyzed the results of that questionnaire in quite a damaging way, suggesting that the replies were not proof that would stand up either in a court of law or a laboratory. I am inclined to think that this analysis had great cogency. On the other hand, what he wants is pretty difficult to give: a demonstration that the rate of convictions is higher in a jurisdiction where the press is, so to speak, unbuttoned, than it would be where the press is held down and where there isn't much publicity. Well, it is very difficult to establish laboratory conditions for such a demonstration.

Despite very unsatisfactory proof on this point, I can't help feeling that a lot of what we're reading is tactical shadow-boxing. We see that it took a full month to impanel the jury in the Speck trial. The reports of cases in the past yield comparable examples. In 1895 approximately 400 jurors were examined before a jury could be put in the box in a New York trial.

The jurors often say that they are indeed influenced, and will even say that they're influenced beyond the point where they think they could render a fair judgment in the case. It seems to me that this is a pretty fair demonstration that the jurors are susceptible to prejudicial influence. The courts use devices to try to eliminate such influences from minds of jurors as the trial goes on. The extent to which they are successful must be a matter of debate.

The Frequency of the Problem

Let me turn to the frequency of the problem; how often does this come up? A well known newspaper editor said that in only a pitiful little string of cases is there any problem of pretrial publicity at all.

To begin with, remember that the American judicial system is largely administrative. Only a small fraction of all cases go to trial and are settled by the adversary system. Most criminal trials are settled by pleas of guilty or by other means that eliminate the necessity of a trial. Therefore, the question is: If only 10 to 15 percent of the cases go to trial, should we really give ourselves all this concern about such a small fraction of cases?

I'd like to spend a moment analyzing that factor. It really isn't surprising when you think about it, that so many cases are settled before trial. If every time two businessmen got into a dispute about a contract they went to court to settle it, we would be doing nothing else but trying civil cases of contracts. The legal devices for settling human controversy are not designed to handle every human controversy. We have to rely on voluntary adjustments and agreements to settle most of them. And if we didn't do that, the whole mechanism would

break down. It is exactly the same with criminal law.

Fortunately, in a great many cases the evidence of the defendant's guilt, or his admission of it, is so plain that the trial ceases to be a necessity, and the matter is settled that way. But let me suggest to you that the importance of the trial is far greater than the percentage suggests, because the trials that are held provide in very large measure the pattern for the settlement of those that are not tried. Generally speaking, the process that takes place between defense counsel and prosecutor in making a settlement involves an estimate of what would happen if this case went to trial. It may be a case, for example, in which unlawfully seized evidence pretty clearly establishes the defendant's guilt; at the same time, it is quite plain that that evidence is going to be suppressed on motion, and, therefore, the prosecution knows they'll never get it in. How strong is the rest of the case? It may be a case in which the evidence is really in doubt. It may be a case that rests on a confession, and there may be an issue about coercion, so that calculating the odds on the outcome if there were a trial is part of the machinery for settlement of the other cases. What happens, then, in the trials that are held has importance and influence far beyond those trials themselves. In many cases that are settled the trial is not present in the flesh, but it is there in the spirit.

These cases that are settled are often very much like the old wars they used to have in China. The two armies met, and they counted noses and bows and arrows and shields and decided that one army was stronger than the other by 3:2 and made an adjustment on that basis. Lots of the settlements in court are not unlike that process. So I would suggest that whether you take 10 or 15 percent, or whatever proportion it is, of the cases that go to trial, it doesn't make the problem unimportant.

Anyhow the argument proves too much. If the trials are unimportant, why do we worry about self-incrimination, rules of evidence, or a million and one problems that relate to having a fair trial? We do so because it is important that if

we are going to try these cases when we can't settle them, we try them in a way that commends itself to our sense of justice.

One might also add that 10 percent isn't really so small a figure. I think I'm right that about 10 percent of us meet our deaths in motor accidents. This doesn't make me feel that it is unimportant to try to cut that figure down a bit. And indeed, to give the reverse of the medal, if much more than 10 percent of the cases went to trial, the judicial machinery would be so glutted and so overburdened—it already is subject to serious delay—that it's a good thing that the figure isn't any higher.

So I come out of all this with the feeling that, if I tried to estimate the frequency of this problem, the fact that most cases aren't tried does not with me cut very much ice. The question remains of those cases that do go to trial: How often is this fact of publicity a matter of importance? Here it is very difficult to be precise. On this point, the A.B.A. report, I think, has made some real progress by making an analysis of newspaper crime reporting in 23 large or medium-sized cities. They broke this down into categories of possible prejudicial pretrial disclosures in the press: that is to say, content of confessions, information that an accused had refused to take a lie-detector test, the results of ballistic studies, expressions of opinion about the defendant's guilt or innocence. The analysis showed that, not only was there a very large number of such releases but that the number varied enormously from city to city. America is not all alike in this respect. For example, in a period of six months in San Francisco the content of a confession given prior to trial came out in the press 26 times. In the same period, in Pittsfield, Massachusetts, where a voluntary press-bar code is in effect, there was not one such mention of pretrial confession.

To come to the point of all this, it seems to me that the common experience of lawyers, the field study of A.B.A., the testimony of jurors themselves in some of the cases I've indicated, give me a basis to conclude that many jurors are in-

fluenced by pretrial publicity, and the problem is one of sufficient frequency and intensity to justify concern. At the same time, I want to repeat that the magnitude of this problem does have a relation to the measures one proposes to take about it, and that we should indeed not drop the matter here but try to make our knowledge of the frequency and nature of the problem a great deal more specific than it now is.

Now passing to the general question of prejudicial publicity itself, although there is this great disagreement about how big the problem is and, as we will see, a great disagreement on what to do about it, there isn't very much disagreement on kinds of publicity that may have a prejudicial effect. Most people agree that they include publishing the contents of a confession, which may or may not be admissible at the trial.

The American Bar Association report made quite an extensive analysis of other particular types of pretrial publicity and problems presented by publishing past criminal records. Other examples are: disclosure of whether the accused refused to take a lie-detector test; revelations about plea-bargaining, that is, whether the defendant's lawyer has made an offer to plead guilty to some lesser offense; revelations about what testimony a witness will give; expressions by the chief of police, usually that, "we're sure we've got the right man"; or during the trial itself, disclosures of things that have been ruled out and proceedings that have been conducted in the absence of a jury; if those things are publicized so that jurors may find out about them. Now that isn't a complete list, but in all the analyses of the problem that I have seen, there is general agreement that, if we are to be concerned about anything, those are the things we ought to be concerned about.

The Questions of Sanctions

Now let me turn to the side of this problem on which there is practically no agreement at all. That is, should there be any sanctions to prevent the disclosure of these things, and if so what sanctions? These sanctions may take various forms.

They can be internal and administrative, such as the Columbia Broadcasting System internal guidelines for employees. They can be official or administrative, like the Department of Justice Code. The rule that Frank Hogan, district attorney in New York, had for many years in his office calls for dismissal of employees who violate his guidelines about revelation of information. These internal guidelines raise plenty of difficult problems, but since they are internal and voluntary they don't raise constitutional questions.

Of major present concern to us, therefore, are sanctions imposed by force of law. This would mean sanctions either against lawyers, by disbarment or suspension; or, if we're dealing with non-lawyers, punishment by contempt or the enactment of criminal statutes under which there might be prosecutions. That is the arsenal of weapons, so to speak.

Against whom might these weapons be directed? First and foremost, needless to say in this gathering, the press. Should there be any exercise of contempt power against the press? If so, it must be on the theory that the press engages in activity that obstructs justice. Or sanctions could be imposed by legislative enactment. In either case we encounter not only policy objections but also the problem of the First Amendment.

Or sanctions might be directed against the police. The American Bar Association report shows pretty conclusively that, in terms of pretrial publicity, it is the police who are the most frequent source of disclosures that may be damaging. Can the police be controlled by the courts? Are the police subject to the contempt power of the courts? If not, should we pass statutes regulating police conduct in this area? On these points not only is there disagreement between the press and the bar; there are pronounced disagreements within the bar itself, very strikingly manifest in the divergent conclusions that were reached by the American Bar Association on the one hand and the New York City Bar Association on the other.

Finally, there is the question of the bar itself as the object of these sanctions. When we're dealing with prosecutors, as in the case of police, we are dealing with public officials subject to legislative or administrative sanctions. When we come to defense counsel, we have a somewhat different problem. They are officers of the court but they are not government employees; therefore, they must be dealt with by sanctions—by disbarment, by suspension, or by contempt. It may well be, as has been suggested, that the problems facing defense counsel are not identical to the problems facing prosecuting counsel; therefore, quite different standards of judgment may be in order. It may also be that what the defense counsel might legitimately do might depend upon what had happened beforehand. If there has been damaging revelation about his client, should he then be entitled to take counteracting steps, which perhaps he shouldn't take in the absence of such preliminary revelation?

All of these are things that one would have to think about in this area. Now, I do not overlook the other means that exist to deal with this problem of publicity. Again, you are all familiar with most of them: change of venue, postponement of the trial, liberal disqualification of jurors who indicate some prior familiarity with the case, sequestering the jurors to keep them from coming in contact with matters that might contaminate their minds. All of these devices are wasteful in one way or another. All of them are imperfect, and as has been said so many times, in an era wherein information spreads so much more rapidly, the idea of change of venue is a much less fruitful one than it might once have been.

Of course, also we should try to eliminate circumstances that give rise to these problems. Take the matter of prearraignment confession; prior to *Miranda*, the main question was whether the confession was voluntary or not. If we didn't have involuntary confessions, most of the confessions would be admissible, and the pretrial publicity would be less damaging. Still, it might have the effect of causing the jury to make up its mind in advance in a way that it shouldn't so it

wouldn't eliminate the problem. The hazards of pretrial publicity do remain despite all these other devices and possibilities of improvement. The question is: To what, if any, of the weapons in the armory of sanction we should resort?

Attitudes of the Press and Bar

I want now to take a look, first, at the attitudes expressed by the press in the A.N.P.A. and A.S.N.E. reports, and then the attitudes taken by the bar in the other two reports.

In a number of places individual press and radio enterprises have initiated or joined in voluntary efforts to prevent prejudicial publicity. In many states press-bar codes have been promulgated by joint agreement. But again one would have to say that on the national level the press reaction to the *Warren Report* and to most proposals to control publicity in any way has been uncompromisingly hostile.

The A.N.P.A. report for example, as far as Dallas and the *Warren Commission Report* are concerned, flatly takes the position that the American press should have been commended rather than censured for its performance at Dallas, and it speaks of the *Warren Commission Report* as having triggered the guns of attack on the press. The A.S.N.E. report makes what seems to me a rather more sophisticated defense of the press at Dallas: "Merely to state the idea that there could or should have been less than complete disclosure in Dallas is to indicate its impossibility. It is worth letting the imagination run for a moment on what the consequences would have been had any areas in the whole ghastly episode been hidden behind a curtain of official secrecy during the first 24 to 72 hours after the fatal shorts were fired." Well, in this, there is much truth. When a president is assassinated, it is quite unrealistic to expect that the first concern of everybody is going to be: "We've got to not touch anything and make sure that whoever did this gets a fair trial." The moment after a thing like this happens, the immediate concern is bound to be with national security.

More important for our present purposes is not debate

about Dallas but the attitude toward the imposition of any legal sanctions whatever. It is, I think, highly significant that Justice Baldwin could do in 1842 something I don't think any judge would attempt today; it is also significant that Samuel Untermeyer would recommend in 1911 things that certainly very few American lawyers would recommend today. The discussion about this problem has largely drifted away from any proposal to apply sanctions to the press. There is to be sure in the A.B.A. recommendation a very limited proposal of this sort. There have been some others, notably by Judge Bernard Myers of New York and Mr. Hogan, who continue to think seriously in terms of legal sanctions against the press. On the whole the focus of concern has shifted very much to what sanctions are going to be put on disclosures by the bar and the police; and, therefore, now, the issue really is the extent to which the press will tolerate the bar and the police disciplining themselves.

There has been a great deal of complaint about suggestions that the police should not disclose or the district attorney should not disclose, and charges of "gag rule." This argument is summed up in the literature in the phrase "interfering with the public's right to know." One comes across this phrase time and time again. It figures on page 1 of the A.N.P.A. report: "The people's right to a free press, which inherently embodies the right of the people to know, is one of our most fundamental rights, and neither the press nor the bar has the right to sit down and bargain it away."

I've been encountering the phrase "the public's right to know" time and time again, and to my mind the phrase has gained nothing through repetition. It could mean anything or nothing, too much or too little. It starts out by being basically ungrammatical because "know" is a transitive verb, and the "right to know" is lacking an object. The phrase is likewise totally vague in terms of time and place. I don't mean to suggest by this that I place a low value on an enlightened and informed public, but I don't think it follows that every identity and every occurrence in the world should be publi-

cized immediately whether this relates to breaking of an enemy code in war time or whether it relates to the identity of a juvenile delinquent or an adolescent victim of rape. There are many facets of human conduct that do not benefit by immediate publicity. Therefore, if the phrase "the public's right to know" is intended to mean anything more than a statement of the value of keeping the public well-informed, then I think it must be made more precise than anybody has made it for me yet.

There is another argument in the press material that I regard as having great substance, and in my mind it is the reason why the British system, whether good or bad in England, is not adaptable or useful as an example for our purposes. The argument is that the press itself is the carrier of positive values, and its disclosure of abuses is a matter of great importance in assuring fair trial.

I personally believe this point to be entirely valid, and I believe it to be of major significance in assessing the whole matter. I am constrained, however, to point out that it suffers from precisely the same disadvantage as the lawyers' argument about jurors' minds being corrupted by publicity. The press has tended to take this for granted without specific proof of how often and in just what ways the press contributes to the entire judicial process. In both cases, it is easy to find specific instances, but if one tries to assess how often and how great is this value, we're up against the same problem of speculation and inference that we face in assessing the danger of pretrial publicity. Despite that lack of precision I think that this country has rightly accepted that value as a key one in the judicial process. The British seem to have very much more faith in the police than we do and less faith in the press than we do. I think they pay a price for the restrictions that they put on the press, and there are some indications in recent years that this price may be beginning to be too high for them.

But however that may be, this is not any longer a matter of social policy only. The United States Supreme Court in

the *Sheppard* case spent some little time in its opinion stressing the positive values of the press to the system of judicial administration, both in the legal sense and in terms of social policy.

Two Bar Association Reports

Now let me turn to the two bar association reports and try to shorten and simplify the discussions of what follows by pointing out what seemed to me crucial differences between them and the crucial differences between the approach taken by the bar and the approach taken by the press. The bar reports manifest this same basic agreement on the kinds of publicity which may be damaging. That is, if you read either bar association report you find this same listing of things, from confessions down to expressions of opinion, referred to as the source of danger.

When we come to the sanctions, the approach taken in the two bar reports is radically different. The New York City Bar Association report recommends an amendment of Canon 20 of the Canons of Professional Ethics (the Canon governing publicity that may be given out by lawyers conducting trials) in such a way as explicitly to prohibit the disclosure of confessions and prior criminal records or making statements about the accused's guilt or innocense. The American Bar Association report, on the other hand, recommends some very limited sanctions for the press and some very extensive sanctions for both the police and the bar.

I'm going to pass rapidly over the less important divergences and come right to this matter of the police, which seems to me crucial. The New York City Bar Association takes a very flat position that any sanctions against the police would violate the doctrine of separation of powers and, therefore, limits its proposals to sanctions against the bar. The report is absolutely devoid of any legal arguments in support of their conclusion that the police lie beyond the reach of legal sanction.

The American Bar Association puts its main emphasis on sanctions directed to the police, because, as I said, their report shows so conclusively that the police are the source of most damaging pretrial publicity. In saying that, I really do not mean to be critical of the police either. It is altogether natural that this be so. Before an accused has been arraigned, he is in the hands of the police, who are generally speaking, the ones in a position to make publicity. Furthermore, they are the ones who are getting the heat if there is crime in the community. The community wishes to see the culprit apprehended and safe conditions reestablished. There is, therefore, great pressure on the police to come up with the right man and to announce when they get him that they've got the right man. Human nature makes it quite clear that it is the most natural thing in the world for the police to do, so I'm not trying to portray them in the role of the villains at all when I say that just because of this they are bound to be the main source of the kind of thing that troubles us when it comes to trial.

There is no need to turn this into a basically legal discussion. Great debate occurs among lawyers about whether the courts can control police conduct before a defendant has been arraigned. One could have a very interesting legal discussion, but I think it very wide of the mark in setting policy.

I think there is absolutely no question but that the legislature has ample power to lay down standards of police conduct. This fact immediately takes us out of problems of constitutionality and straight into questions of policy. Should the legislature enact any such rules binding on the police? Or should it set up any legislatively authorized controls whereby the police may be punished? I would have to say that on this score the New York City Bar Association report is very defective, and it never undertakes to grapple with the question of policy. Because of having taken this, to my mind, quite unwarranted position that it would be unconstitutional to interfere with the police, the report never touches the question whether it would be a good idea if we could. Once

one looks at it in legislative terms, one has to confront the policy problem, which the American Bar Association does. And I guess the closest thing I'm going to do by way of coming to a conclusion on all this is to say that it seems to me that there is ample basis for trying to evolve some statutory system of sanctions that can be applied to police with respect to disclosures.

It is highly desirable that these systems should be very flexible. I would not say, for example, that it is always a bad thing to have a disclosure of a pretrial confession. There should be good reason for it, but curiously enough, the confession itself may in some circumstances be the accused's best protection. He may wish to raise the question of voluntariness. More than that, in some circumstances the confession may prove on analysis to be internally self-destructive. Of course, if he just says in confession, "I'm guilty," it affords no lead. But, if the confession says how he did it, then the sequence of events by which he said he did it becomes subject to checking. In a case in New York, the press played a part in the analysis of a confession that proved to be spurious.

The English would say that it is absolutely absurd to rely on the press to do our investigating for us. The reporters have no business sticking their noses in investigations that Scotland Yard is well equipped to do itself. Our experience in this country, however it may be there, I think does not entitle us to take the same position. Our police problem, our crime problem, is so different that, it seems to me, we must stick with the general view that the press frequently does have an investigative contribution to make. Any notion that a sanction automatically should be applied when a confession is disclosed seems to me much too inflexible. But I think these circumstances are more likely to be the exception than the rule.

The idea of sanctions on the press has, as I've said, faded from the foreground of this discussion for two reasons. One is the very real and substantial doubt about whether the

Supreme Court would tolerate them constitutionally. And the other is that sanctions applied to the press would be a very unpopular thing for a legislature to embark upon. The press is not without means of making its weight felt on these issues; and, therefore, I think many people have been disposed to drop the idea of sanctions on the press, not so much out of conviction as out of expediency.

Restrictions on Defense Counsel

Now one final thing: defense counsel and the extent to which defense counsel should be subject to restrictions such as the *Van Duyne* rules in New Jersey. Here we come to an area where I remain very troubled. After all, the press is not the only beneficiary of the First Amendment. Everybody is entitled to benefit by the First Amendment. When we deal with the prosecuting attorney we are dealing with a public official who can be required to conform to official policies. But when we're dealing with defense counsel, we're dealing with a person who is not an official employee; therefore, the only sanctions we can invoke against him are professional ones. He is an officer of the court, and he can perhaps be subjected to contempt penalties. And yet let us think about that. Why should he, under the First Amendment, be less entitled to protection than the newspaperman? Is it merely because he is an officer of the court? For some years I've been teaching occasionally at the Yale Law School, and in my very first class there about ten years ago I had a law student who is now the principal crime reporter for the New York *Times*. He is not acting as a member of the bar, but he is a member of the bar, and I suppose an officer of the court. Does that mean that if, functioning as a newspaperman, he reveals pretrial confessions, or engages in other conduct that would come under the sanction of the *Van Duyne* rules of New Jersey, he could be called before the New Jersey court and be disbarred, because, although acting as a newspaperman, he was a lawyer and therefore an officer of the court? I would suppose not.

Suppose we have a lawyer who is not involved in the case but who is sort of an amateur Hawkshaw. He likes to interest himself in these things. He is not functioning as a newspaperman at all but as a voluntary interloper. He establishes things to his satisfaction, and reveals various things about the case. There is one very striking difference on this point between the two bar association reports. The sanctions proposed to be applied to the bar in the American Bar Association report apply only to lawyers engaged in defending or prosecuting the case. The sanctions proposed in the New York City Bar Association report apply to lawyers generally. It may be very unfair of me, but I'm inclined to think that this very striking difference is accidental and that neither bar association, American or the New York City, reflected on the point.

Finally, even if we're dealing with a lawyer who is involved in the case, so that he is before the court, functioning as an officer of the court, what is a defense lawyer to do when the press by one means or another has published information that he regards as damaging? Is he to be helpless to rebuff this in any way? I should think not. I should think that we must then adjust the machinery.

Maybe you will conclude from all this that the whole thing is too complicated to have any machinery at all, that it is better to leave things as they are. But if we don't follow that path, if we try to do something about it in terms of sanctions on bar and police, I think that what I have said suggests the need for flexibility and for, as far as possible, an administrative enforcement rather than enforcement by criminal law.

THE ROLE OF THE JUDGE

J. Braxton Craven, Jr.

I SOMETIMES WISH I could take a sponge and wipe out what I learned about criminal law at the Harvard Law School in 1939. The years spent as assistant United States attorney and the almost useless experience as defense counsel in the 1950's might also be exorcised. While I am about it, I could well erase five years spent conducting trials as a Superior Court judge and the first few years as a federal district judge —until about 1963. If I could accomplish all of that, I would then be in a better frame of mind fully to accept and implement the enlightened concepts that are now so prevalent.

I am exaggerating, of course, but not so much as you might suspect. Professor Livingston Hall at Harvard, in the preface to his and Professor Yale Kamisar's casebook entitled *Modern Criminal Procedure*, notes that the October 1, 1966, edition "marks a 60 percent increase over the one published only a year ago." This is obsolescence on wheels.

A particularly disruptive memory that I could profitably forget is hearing one of America's most distinguished United States circuit judges, John J. Parker, say to defense counsel during the argument of an appeal at Richmond: "But Mr. So-And-So, if we agree with you that the district judge committed the numerous errors assigned, does not the record as a whole clearly show your client to have been guilty?"

This sort of thing is so far "out" now that we must assume

that it will never come "in" again. Such a pragmatic approach is not in vogue. It is today's conventional wisdom that we are not concerned so much with guilt or innocence as with the protection of our fundamental liberties—which sometimes seems to include the liberty to commit crime and escape punishment.

Forgive my quoting from a letter that I wrote to my colleagues on the Fourth Circuit about a decision that came down in February, 1967 (I was not on the panel). It illustrates my own perplexity and ambivalence. I wrote: "I am trying my best to catch up with the new criminal law, but no matter how fast I run, it stays ahead of me and—I note by this opinion—is still widening the gap. *Moorer v. State of South Carolina*, 368 F. 2d 458, is not the worst result of capital punishment: it also kills people. . . . I will now return to my memories of the good old days and offer no further obstruction to the protection of our fundamental liberties. Perhaps over by the fireside I can find some old doddering fool who will talk with me about whether or not the fellows are guilty—as if that matters."

Judicial Paternalism in Criminal Justice

But all I have said thus far is nostalgia, and nostalgia will get you nowhere. Moreover, the good old days weren't nearly so good as I would like to think. What has happened in the administration of criminal justice is analogous to what has happened in civil rights—and largely fueled from the same source. Not long ago, the whole criminal system was paternalistic. The trial judge could scarcely escape, if he wanted to, the role of father-figure, and the effectiveness of the system depended in large part upon how well he fulfilled that role. The white as much as the Negro was the victim or beneficiary, depending upon one's point of view, of paternalism. Almost every trial judge who sat on a bench during this era likes to tell a story (common, I think, to all judges) about the defendant who responded to the inquiry as to whether he had a lawyer: "No, but Judge So-And-So (the one

on the bench) will look after me, and I don't need one." More than once in the late Fifties I was accused by prosecuting attorneys of "making the last speech" for the defendant in the course of my instructions to the jury. It was not infrequent that jurors—perhaps themselves a bit paternalistic—acquitted those who were unrepresented by counsel. I confess that I was pleased that in the federal district court I seldom had a demand for jury trial. Perhaps I went too far on one occasion at Bryson City, N.C., when, sitting as a jury, I returned a verdict of guilty, and upon finding that the defendant had no prior record, set the verdict aside as contrary to the weight of the evidence.

I once held court in Maryland, where I am entirely unknown, and was astonished that all criminal defendants who appeared before me that week waived trial by jury. I was inclined to take it as a tribute to my personal appearance and physiognomy until Judge Simon Sobeloff explained to me that it is established custom in Maryland to waive trial by jury. I do not know the origin of the practice, but that it is so has been noted in an opinion by the United States Supreme Court.

Waiver of trial by jury is to me an obvious desideratum. Jury trial is inherently cumbersome, unwieldy, inefficient, and very time-consuming. In a simple case, trial by jury requires two to three times longer than before a judge without a jury. In either a complex or a sensational case, the multiple is far greater.

The most extreme example of lost motion and wasted time is the trial of a capital case. This spectacle, where the defendant is warned in Chaucerian English that the King desires to cut off his head, is reminiscent of the Roman Circus. In a fairly typical capital case (one I tried), it takes about two days to pick a jury and five hours to try the case. The tail wags the dog. It is not unusual for two out of three veniremen to be excused because they say they do not believe in capital punishment—but examining them and excusing them takes time.

I have never been able to overcome my initial astonishment upon learning some twenty years ago that the sovereign State of North Carolina does not permit any criminal defendant to waive trial by jury and elect to have his guilt or innocence determined by a trial judge. The logic of it continues to escape me. It is one thing to have a precious right upon which one may insist against all the powers that be, and quite another to have that right crammed unwillingly down your throat. For the State to compel a citizen to determine his guilt or innocence before a jury over his protest is to me an obvious distortion of a fundamental concept.

As I have said previously, nostalgia will get us nowhere. There is more than one sort of father-figure. When the judge on the bench lacked compassion and an understanding heart, the felt need for protection from his almost plenary power over the criminal defendant could not be denied.

Proper Role of a Judge: Sober Second Thought

What is the proper role of a judge in our society?

With respect to the criminal law, the judge's function is to be the sober second thought of the community. It is sometimes harder to be it than to know what it is. Leniency from the bench requires much more moral courage than does harshness. My job would have been easier when I held criminal court if I had been unaware of the constant criticism that the country is going to the dogs because the judges are mollycoddling the criminals. It isn't so. Indeed, some of our trouble has been caused and brought about by the historic harshness of trial judges in America. Perhaps because we are a young country, we treat persons convicted of crime, especially property crimes and those involving moral concepts, more harshly than any other civilized nation.

No judge is wise enough to determine precisely how long a man ought to be imprisoned. Parole boards can do it much better than judges—not because they are smarter, but because they have much more information about the prisoner and of a more reliable sort: how he gets along with other

prisoners, his attitude toward guards, willingness to work, and general behavior. All sentences ought to be, in effect, indeterminate, and to protect against disparity of sentence—the greatest single demoralizing factor in prison—sentences longer than a certain maximum ought to be reviewed by appellate courts. The Senate of the United States this summer passed legislation permitting the federal appellate courts to review, under certain conditions, the imposition of sentences in the district courts. I hope very much that the House will approve this bill. It is ironic that it is almost always the sentence below that is the real grievance on appeal—but it cannot be attacked except obliquely. America is the only civilized country in the world that permits a single judge finally and irrevocably to determine punishment. I often wished when I was a trial judge that my sentences might be reviewed, and it is difficult for me to understand how any trial judge, lacking omniscience, could feel otherwise. To limit appellate judges to the periphery of the criminal trial—without power to go directly to the heart of the grievance—is like permitting the doctor treating cancer every method of treatment except surgery—which is sometimes the only expedient.

When trial judges impose harsh sentences, they unwittingly invite bad adjective law from appellate courts. It is hard for an appellate court judge faced with an unconscionable sentence in the court below to wash his hands like Pontius Pilate, and he is sorely tempted, if he has a heart, to find prejudicial error where there was none until he discerned it. Hard cases make bad law; and harsh, unconscionable sentences invite innovations in criminal procedure. If appellate courts were given the power to review and reduce the sometimes absurd sentences in the inferior courts, the understandable temptation to afford the victim a new trial by further and dubious refinements of criminal procedure would be removed. We really have it backwards: there ought to be more restraint on the trial bench and less on the appellate bench with respect to sentencing, and if there were, the result might

be nearer what we want: enlightened punishment that is quick and certain.

I think I detect an increasing awareness of the efficacy of the short sentence, which I define as three days to three years, depending on the seriousness of the crime. Short sentences promote rehabilitation. When a prisoner has served five or ten years or longer, he often comes out bragging that he built his time standing on his head and could do it again. With that attitude, he likely will.

I do not suggest that long sentences are never necessary. Indeed, the last sentence that I passed as a trial judge, and the last one that I shall ever pass, thank heavens, was for the maximum ten years permitted by the statute. If I could have done so, I might have made it fifteen or even twenty because I am convinced that this person was dangerous to society. In about fifteen years he will become forty years of age, and hopefully, his sociopathic tendencies may diminish sufficiently to permit him freedom. I did not quite tell the truth: I sentenced this individual to a ten-year indeterminate sentence—so that if the prison doctors and the Parole Board should find some miraculous change of personality he can be released at any time and long before the expiration of the full period. But I doubt that he will be.

The state criminal trial judge, like his federal counterpart, has the independence of a hog on ice in sentencing those who plead guilty or are convicted of crime. I see no justification for such inscrutible finality. Given too much power in this area, incongruously, he is sometimes given too little in others. As I have noted, in North Carolina he cannot even permit a defendant to waive trial by jury and himself hear and determine the case. Nor can he, in North Carolina, except at the peril of reversal, even ask questions of witnesses during the course of a trial. Such questioning may be considered *verboten* comment on the evidence and thus an interference with trial by jury. The role of the state trial judge is thus unfortunately reduced to little more than that of a referee at a prizefight. Such an unusually narrow concept of the role of the trial

judge probably has its historical basis in the behavior of Governor Tryon's judges when Carolina was a crown colony.

Differing Roles of Federal and State Judges

The role of the federal trial judge in criminal cases is quite different in concept, but not as different as one might expect in actual practice. Necessity is the mother of invention. Although state trial judges are justifiably fearful of asking too many questions, it is not unheard of for a state judge to inquire of counsel in the presence of the jury whether or not a certain line of inquiry has been pursued and whether counsel may wish to pursue it. Usually counsel do.

Federal trial judges are sometimes called "common law judges." Mr. Justice Frankfurter, in *Johnson v. United States*, 333 U.S. at 54, described the power of a federal trial judge, similar in scope and responsibility to that of a common law judge, in these words: "Federal judges are *not* referees at prizefights but functionaries of justice." Thus a federal judge, unlike his North Carolina counterpart, may properly participate in the trial—even to the extent of himself calling and examining witnesses to elicit the truth. Everyone agrees a trial judge ought to have such power—except lawyers.

The role of both state and federal trial judges is now being changed, sometimes quite specifically, by constitutional and other procedural decisions of the appellate courts. The bump-on-a-log concept of the state trial judge is being forced into retreat before such well known gentlemen as the famous Japanese *Ex Mero Motu* and his Italian cousin *Sua Sponte*. Increasingly, affirmative duties are being put upon the trial judge, whether he be state or federal, and whether or not judicial action has been initiated or moved by counsel. Nowadays the trial judge may himself be compelled to control and direct the course of the trial—without regard to what is suggested to him by the adversaries. I suspect that this trend will continue, and if it does, the adversary nature of our system will inevitably diminish. For example, already the trial judge may, under certain circumstances, have an affirmative

duty, without regard to the conduct of counsel, to stop the trial and initiate a mental competency inquiry; to grant a continuance although none has been requested; to himself determine the voluntariness of a confession before permitting the jury to make a like determination; to see to it that a defendant understands his constitutional rights and not to leave the imparting of that information to defendant's counsel; to see to it that any waiver of constitutional right is understandingly made even though a defendant has the assistance of counsel in making his decision; to charge the jury on every essential element of the offense and to do so correctly, whether requested or not by counsel.

These are simply a few of the side effects upon judges of the current revolution in criminal procedure. Little, if anything, is presently being done to the substantive criminal law. As Professor Mueller says in the introduction to the 1965 edition of his and Jerome Hall's casebook entitled *Criminal Law and Procedure*: "The current and temporary overemphasis of the United States Supreme Court on matters of criminal procedure—long overdue and welcome for the most part—may make it appear to some that criminal law is subordinate to procedure."

It will be some time yet before anyone can know very accurately what the role of the trial and appellate judge will become in the area of criminal law and procedure. It is no one's fault that this is so, but certainly legislative default has brought it about. The judges, and especially the justices of the Supreme Court, have entered this area of low visibility because others have not done so. Unlike legislative bodies, judges have no power simply to sit down together and devise codes of criminal procedure. We must proceed in the only method available to us: case-by-case adjudication. The result is inevitably a crazy patchquilt of partial answers and many unanswered questions. What America needs, it seems to me, is a carefully detailed and precisely defined, to the maximum extent possible, code of criminal procedure spelling out the powers and responsibilities of the police and the rights

of the individual at every stage of the process from interrogation prior even to suspicion, on through arrest, trial, appeal, and post-conviction remedies. It will take a long time, if indeed it is even possible, for any court or system of courts to enunciate such a set of rules in the case-by-case adjudication method. Since the United States Supreme Court lacks supervisory power over the state courts, such a process is impossible of achievement except at the rather high price of converting criminal procedure into constitutional law. The super structure that does exist rests largely upon the Fourteenth Amendment, and it can scarcely be expected to bear the full load. What we need are uniform codes of criminal procedure which can only be given us by the legislative branches of government. As Judge Henry Friendly of the Second Circuit has suggested, the Bill of Rights was not intended to be a code of criminal procedure and is not well adapted to that end. I shall share his doubt that we can find a home for every good idea and enlightened concept in specific provisions of the Constitution. I think the ultimate solution must be a thorough revision and enlargement of the Federal Rules of Criminal Procedure (and state codes) to incorporate and make explicit the case-by-case promulgations of constitutional dogma together with rules of less dignity but perhaps equal validity.

Relationship of Judges to Higher Court

Now a word about the duty of the judge with respect to decisions of a higher court. Judges of the United States Courts of Appeals are, of course, bound by decisions of the United States Supreme Court. United States district judges are likewise bound by those decisions, and in addition, bound by the decisions of the particular court of appeals of the circuit within which the district judge sits. The duty of obedience inheres in the hierarchy of courts. Otherwise, there would be no sense in calling the highest court "supreme." But judges of inferior courts, even constitutional ones, are privileged to know and appreciate what Mr. Justice Jackson once said:

"The Supreme Court is not final because it is infallible, but is infallible because it is final." Thus our duty of obedience is not a slavish one. Nor are we compelled to like every decision of the Supreme Court or even pretend that we do. Our relationship is more one of propriety than it is of law or even rules. It is simply unbecoming, in my opinion, for a federal judge of an inferior court to aim carping criticism at the Supreme Court. I would not do so for two reasons: first, I have no wish or inclination to do it; and, second, if I had, I would think it highly inappropriate.

I suggest it comes to this: that almost every federal judge, regardless of his background and personal biases, is himself sensitive enough to the incredible difficulty of decision to view the work of the Supreme Court sympathetically even when in disagreement with its decision. The Court is, after all, constantly engaged in making hard decisions. The complexity of the problems that confront the Court are of a kind that would defy the powers of the Delphic Oracle and confound the wisdom of Solomon. No thoughtful person who even scans the decisions of the Court in a single year can be amazed that some questions are resolved by a vote of five to four.

Even when I disagree with the Court—and I sometimes think it goes too far in the pursuit of valid objectives—my reaction is really not so much one of criticism as of disappointment that these mere mortals in awesome positions have not been able to come up with a better solution to an insoluable problem. I am slow to think the Court is "wrong" because I perceive so well the difficulty of finding what is "right."

Creative Role of the Supreme Court

My own observation of the quality of the work of the Court parallels that of those students of history who think that the present membership is relatively very able and dedicated. It does not matter to me that the Court is not entirely composed of persons having had long experience as trial and appellate judges. I am impatient with the occasional bill offered in the

Congress to provide that such experience shall be a prerequisite for future appointments. Such a rule would have denied us the service of Frankfurter, Brandeis, and even the great Marshall. The Court has always made policy decisions, and it is its historic function to do so. I do not think that judges have a monopoly on wisdom, and I would deplore a Supreme Court consisting only of my brethren.

Finally, I respect the Court because it is an intellectually honest court. Not even the Court's enemies excoriate it more mercilessly than do its own members. Nor does the Court itself hold itself to be above criticism. Typically, Mr. Justice White, in *Miranda*, says that if the Court is to "announce new and fundamental policy to govern certain aspects of our affairs, it is wholly legitimate to examine the mode of this or any other constitutional decision . . . and to inquire into the advisibility of its end product in terms of the long range interest of the country." But something else he says in the same opinion is even more concise and contains both strong criticism of the Court and a firm defense of its function. It is worth reading: "That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious—that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. This is what the Court historically has done. Indeed, it is what it must do and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers."

Cardozo somewhere speaks disparagingly of the judge who needlessly sacrifices justice because he will not see that it can

be squared with law, and thus "plunges the knife with averted gaze." The true role of the judge in the administration of criminal justice is the same on the civil side of the docket: to concern himself to find a way within the framework of the law to a just result.

JUVENILE DELINQUENCY AND THE JUVENILE COURT

Mason P. Thomas

After living through two world wars, Winston Churchill referred to this century as the "terrible twentieth century." If he were here today, he might have a more stinging comment about the state of the world. These are times of revolution and change; confused values; moral upheaval; reexamination of basic religious concepts; competing ideologies of government; conflicting theories of education; poverty and wealth in America; racial integration, discrimination and violence; organized crime; breakdown of the family unit; replacement of men by machines; etc. Democracy and communism are at war with words and on the battlefield.

These problems seem removed from the problems of juvenile delinquency and confusion concerning the juvenile court. Yet, there is a connection. The child of today faces an enormously complicated world of machines, undeclared wars, fierce competition in a materialistic society, and confusion over right and wrong. When he asks a question, his parents may not have an answer. New knowledge may bring more questions than answers.

The juvenile court has been society's institution for solving certain complex problems affecting children—delinquency, dependency, and neglect. These problems are not solved. Thus, the validity of the institution is an appropriate and timely topic.

Historical Development of the Juvenile Court

The juvenile court developed in the Nineteenth Century when social reformers objected to the application of the punitive aspects of the criminal law to children. The traditional philosophy of the criminal law has been punishment. This philosophy might be summed up in the phrase that "the punishment should fit the crime." Punishment for the offense was more important than rehabilitation of the offender.

There was a spirit of social justice in the Nineteenth Century which developed into concern about the treatment of children in courts. There were several significant developments prior to the first specialized court for children. Reformers were concerned about children being placed in jails and prisons with adult offenders; thus the first separate institution for juvenile offenders (the New York House of Refuge) was established in 1825. There was concern about children being tried in criminal courts along with adult criminal cases; Massachusetts was the first to provide for separate hearings for children in 1870. Reformers recognized that all child-offenders do not require confinement in an institution or prison; thus Massachusetts first provided for foster homes and a statewide probation system in 1869 and 1890.

The best-known source of the juvenile court idea was inherited from English law. It is summed up in the Latin phrase, *parens patriae*, which refers to protective responsibility of the state for children within its borders. Early leaders of the juvenile court movement felt that a child who violated the law should "be dealt with by the state as a wise parent would deal with a wayward child." This idea was embodied in the legislation enacted by the Illinois legislature in 1899 creating in Chicago the first juvenile court in the world.

This first juvenile court contained many of the features which have become characteristic of the juvenile court in the United States: jurisdiction of dependent, neglected and delinquent children under a specified age (this now varies be-

tween 16 and 21); separate hearings from which the general public is excluded; informal procedures which are largely left to the discretion of the juvenile court judge; confidential records; detention of delinquent children in detention homes separate from jails; and a probation staff. Thus, the juvenile court was born in an aura of reform and spread throughout the United States and the world with amazing speed. It has become America's primary contribution to the court systems of the world. Yet, it is still the infant of our court systems; the juvenile court as an institution is 68 years of age.

The juvenile court developed its own language. The "treatment" philosophy replaced the punitive approach of the criminal law. This was characterized by terms such as "individualized justice" or "treatment according to need, rather than punishment for the offense." "Intake" refers to a screening of cases and informal dispositions by the probation staff, who may decide when a case should be initiated, whether the case would be official or unofficial, or when a case should go to court. The juvenile court "petition" and summons replaced the criminal warrant. The juvenile probation officer completed a "social study" or "social investigation" containing background information or facts about the child and his family to guide the judge in prescribing appropriate treatment. An informal juvenile court "hearing" replaced the criminal trial. Child offenders were "adjudicated" delinquent, rather than convicted of a crime. There was a "disposition" rather than a sentence.

There were a number of assumptions and concepts underlying the development of the juvenile court. There should be a judge who specializes in children's cases. The skills required of the judge were viewed as highly personal: sensitivity, wisdom, skill in human relations, understanding of children, capacity to communicate, etc. The judge was cast in the role of the state's "wise father" who would prescribe treatment according to the need of the child. The juvenile court hearing was seen as a treatment experience for the child during which the judge would make an impact upon the child which would

change his attitude and behavior. Since the purpose of the juvenile court was to help and to protect, little thought was given to protection of the rights of children and parents. The adversary process and criminal procedures were to be avoided; lawyers were neither necessary nor welcome. Delinquency was viewed as a symptom of a need for help; thus the court was to study, diagnose and prescribe treatment which would lead to rehabilitation. The need of the child was considered more important than his offense. Treatment was contemplated before the right to provide treatment was established through customary judicial processes. The court was presumed to have the knowledge required to diagnose the reasons for delinquency and to prescribe effective treatment. It was assumed that the necessary resources for implementation of the treatment plan would be available, including an adequate probation staff.

Performance of the Juvenile Court

There is considerable confusion and misunderstanding concerning the actual performance of the juvenile court during the last 68 years. Some observers of the system tend to assume that all juvenile courts have the characteristics and resources ascribed to them in the ideal. Some people assume that juvenile courts are pretty much the same throughout the United States.

Juvenile court programs are not uniform throughout the United States or even within specific states. They vary in jurisdiction, quality of judiciary, adequacy and sources of financing, availability of probation staff or juvenile detention facilities, and in other resources. Some are state-wide programs; many are dependent upon local governments which vary in their willingness and ability to provide adequate financing.

Further, many of the assumptions and concepts of the juvenile court advocates have not been implemented, nor are they possible. The ideal of a qualified, specialized juvenile court judge has often proved unattainable. A recent survey

of juvenile court judges revealed that half had no college degree; a fifth had no college education; a fifth were not attorneys; three-fourths devoted less than one-quarter of their time to juvenile and family matters. The average time for juvenile court hearings was about 15 minutes.

The causes of juvenile delinquency are so numerous and complex that no individual judge—not matter how competent—could prescribe effective treatment in some cases. Indeed, the experts do not agree on the causes of delinquency nor appropriate solutions.

Consider the following quote from the Task Force Report on Juvenile Delinquency of the President's Commission on Law Enforcement and Administration of Justice: "The failure of the juvenile court to fulfill its rehabilitative and preventive promise stems in important measure from a grossly overoptimistic view of what is known about the phenomenon of juvenile criminality and of what even a fully equipped juvenile court could do about it. Experts in the field agree that it is extremely difficult to develop successful methods for preventing serious delinquent acts through rehabilitative programs for the child. There is no shortage of theories of the etiology of delinquency. They range from the intrapsychic to the sociological, from the genetic to the anthropological, even to theories turning upon analyses of body types and structures. Some have looked for basic, generalized explanations of all delinquency. Some have noted the enormous variety in the types of conduct officially denominated delinquency as well as in the types of juveniles found to be delinquents and have begun to suggest narrower explanations differentiating among kinds of deviant behavior. But fundamentally delinquency is behavior, and until the science of human behavior matures far beyond its present confines, an understanding of those kinds of behavior we call delinquency is not likely to be forthcoming."

Diagnostic evaluation of children coming into juvenile courts is basic in the juvenile court ideal. Yet, a recent survey of juvenile courts reveals a scarcity of psychologists and psy-

chiatrists. To quote from the same Task Force Report: "Where clinics exist, their waiting lists usually are months long and frequently they provide no treatment but only diagnosis. And treatment, even when prescribed, is often impossible to carry out because of the unavailability of adequate individual and family case work, foster home placement, treatment in youth institutions."

Juvenile probation services have been considered the cornerstone of an adequate juvenile court program. The sad fact is that many juvenile courts have no probation services available. While juvenile probation is provided for by statute in all states, there are no juvenile probation services available in 165 counties spread among four states. There are 31 states which have juvenile probation services in each county—approximately three-fourths of the counties of the United States. There are a number of patterns for administration of juvenile probation services: by the juvenile courts, by state correctional agencies, or by public welfare departments. These programs vary widely in professional standards, whether civil service or merit system protection is provided, adequacy of salaries and case loads. In many areas, salaries are inadequate to attract qualified personnel. Frequently, case loads are so high that probation exists more on paper than in terms of real service to a child and his family.

Other factors have contributed to the confused nature of the juvenile court and its low status in the judicial system. The emphasis on treatment and the close relationship of the juvenile court to the helping professions (psychiatry, psychology, social work) has led to confusion over the real nature of the juvenile court. Is it a court or a social agency? People may assume it is both, for it has attempted to diagnose and to treat; it has also adjudicated legal rights.

Lawyers have infrequently appeared in juvenile court cases. When they come, they seem uncertain of their proper role in this specialized court. Should they play the lawyer's traditional adversary role? Or would some other role—like friend of the court—best advance the interests of their client? The

answer to this professional dilemma has varied with the philosophy and biases of the juvenile court judge.

The confidential nature of juvenile court processes has also contributed to the confusion. Newspapers tend to distrust and dislike publicly supported programs surrounded by secrecy. Frequently, reporters are not permitted to attend juvenile court hearings, either under the juvenile court law or the policy of the particular judge. State laws also frequently forbid the use of names of children involved in delinquency proceedings. Names, particularly names of children from prominent families, make news. Statistics about the juvenile court are dull and have little news value. Thus, the press has tended to deal with this situation in two ways (1) it has ignored the juvenile court because it has little news value; (2) it has attacked the juvenile court for its secrecy and confidentiality, feeling that the supporting public has a right to know. The result has been that the public knows little about the juvenile court program or how it deals with delinquency. It has not had sufficient information to evaluate its effectiveness. People tend to distrust something they don't understand. This attitude may lead to inadequate tax support.

Thus, the treatment orientation, confidentiality, lack of understanding, lack of attorney representation in juvenile court cases, inadequate qualifications and salaries of judges, the confused status of the juvenile court as a court or social agency, have all contributed to the low status of the juvenile court in the community and in the judicial systems. The juvenile judgeship is not a high status judicial position. It has sometimes been a political bone which is thrown to a loyal partisan who can't quite otherwise make a living.

Thus, as the Task Force indicates, the ". . . great hopes originally held for the juvenile court have not been fulfilled. It has not succeeded significantly in rehabilitating delinquent youth, in reducing or even stemming the tide of juvenile criminality, or in bringing justice and compassion to the child offender. To say that juvenile courts have failed to achieve their goals is to say no more than what is true of criminal

courts in the United States. But failure is most striking when hopes are highest."

Extent of the Delinquency Problem

Juvenile court statistics are notoriously inadequate. Further, definitions of delinquency under juvenile court law are so broad that delinquency includes behavior that would not be unlawful if committed by an adult—behavior such as truancy, being ungovernable or "in need of supervision," or running away from home. Definitions of delinquency are frequently so vague that they apply to almost all children. Take, for example the North Carolina statute giving the juvenile court jurisdiction over any child under the age of 16 "who is delinquent or who violates any municipal or State law or ordinance or who is truant, unruly, wayward, or misdirected, or who is disobedient to parents or beyond their control, or who is in danger of becoming so . . ."

The 1965 FBI Uniform Crime Report shows that one in nine children in the United States will be referred to the juvenile court for delinquency before the eighteenth birthday. This ratio increases when boys alone are considered; one in six boys will be officially involved in delinquency before he is 18. Arrests of persons under eighteen for serious crimes increased 47 percent in 1965 over 1960; persons under eighteen increased 17 percent in the general population during that period. During 1965, persons under eighteen referred to juvenile court constituted 24 percent of all persons charged with rape, 34 percent of persons charged with robbery, 52 percent of all persons charged with burglary, 45 percent of all persons charged with larceny, 61 percent of all persons charged with auto theft.

One of the limitations of the juvenile court is a narrow range of dispositional choices in dealing with an adjudicated delinquent. In most courts the alternatives available to the judge are: release to the parents, probation, or commitment to a correctional institution or training school. Juvenile probation is the most common disposition. In many areas this

would mean only minimal supervision; it might be equivalent to leaving the problem in the hands of inadequate parents. Commitment to an institution may remove a troublesome child from the community, but it also creates certain other problems for the child—the stigma of having been sent away, which tends to cause the community to expect the child to continue delinquency upon his return from the institution. The Task Force says, "institutionalization too often means storage—isolation from the outside world—in an overcrowded, understaffed, high-security institution with little education, little vocational training, little counseling or job placement or other guidance upon release." Many institutions are unable to provide effective treatment.

What emerges is a dichotomy between theory and fact, between purpose and reality. As the Task Force puts it: "In theory, the juvenile court was to be helpful and rehabilitative rather than punitive. In fact the distinction often disappears, not only because of the absence of facilities and personnel but also because of the limits of knowledge and technique. In theory the court's action was to affix no stigmatizing label. In fact a delinquent is generally viewed by employers, schools, the armed services—by society generally—as a criminal. In theory the court was to treat children guilty of criminal acts in noncriminal ways. In fact it labels truants and runaways as junior criminals.

"In theory the court's operations could justifiably be informal, its findings and decisions made without observing ordinary procedural safeguards, because it would act only in the best interest of the child. In fact it frequently does nothing more nor less than deprive a child of liberty without due process of law—knowing not what else to do and needing, whether admittedly or not, to act in the community's interest even more than the child's. In theory it was to exercise its protective powers to bring an errant child into the fold. In fact there is increasing reason to believe that its intervention reinforces the juvenile's unlawful impulses. In theory it was to concentrate on each case the best of current social science

learning. In fact it has often become a vested interest in its turn, loathe to cooperate with innovative programs or avail itself of forward-looking methods."

Justice Fortas of the U.S. Supreme Court commented in the same vein in the *Kent* decision: "There may be grounds for concern that the child receives the worst of both worlds; that he gets neither the protections accorded to adults nor the solicitous care and regenerative treatment postulated for children."

Judicial Interpretations of Juvenile Court Law

Relatively few delinquency cases have been appealed from the juvenile courts to the supreme courts of the states, for several reasons. One is that lawyers are rarely involved. A second is poverty or ignorance; parents have frequently not had funds to employ counsel; they have not always understood their right to appeal. The result has been a lag in the clarification of rights in juvenile delinquency proceedings through the usual processes of judicial interpretation of juvenile court statutes.

In the early 1900's, a number of attacks were made on the constitutionality of juvenile court laws and procedures. For the most part, juvenile court statutes were upheld as constitutional. The North Carolina juvenile court law was attacked as unconstitutional soon after its enactment in 1920. In upholding its constitutionality, the state Supreme Court said: ". . . where the investigation is into the status and needs of the child, and the institution to which he or she is committed is not of a penal character, such investigaiton is not one to which the constitutional guaranty of a right to trial by jury extends, nor does the restraint put upon the child amount to a deprivation of liberty within the meaning of the Declaration of Rights, nor is it a punishment for crime." Thus court decisions supported the view that a juvenile court hearing is not a criminal trial, so that the constitutional rights guaranteed to an adult charged with a criminal offense were not applicable to juvenile court proceedings. Thus, court decisions

ruled that a delinquent is not a criminal—that commitment to a juvenile correctional institution is not imprisonment.

The United States Supreme Court never reviewed a delinquency case on appeal from a juvenile court until 1966 when it accepted a waiver case which arose in the District of Columbia Juvenile Court for review on certiorari—*Morris A. Kent Jr. v. United States.* The *Kent* decision was followed this year by a delinquency case appealed from a juvenile court in Arizona—*In the Matter of Gerald Gault.* The impact of these decisions has been to define more sharply the procedural rights of children and parents in juvenile delinquency cases. To summarize, a child who is alleged to be delinquent and who may be committed to a state institution if adjudicated delinquent has the following constitutional due process rights in the adjudicatory state of the court hearing (as distinguished from the "pre-judicial states of the juvenile process" and the "post-adjudicative or dispositional process"):

1. Right to Notice of Charges: The child and his parents must "be notified, in writing, of the specific charge or factual allegations to be considered at the hearing. . . ." This written notice must be given "at the earliest practicable time, and in any event sufficiently in advance of the hearing to permit preparation."

2. Right to Counsel: ". . . The child and his parent must be notified of the child's right to be represented by counsel retained by them, or if they are unable to afford counsel, that counsel will be appointed to represent the child." In the *Gault* case, the mother's knowledge that she could have had counsel was not considered by the Court to be a proper waiver of the child's right to counsel. "They had a right expressly to be advised that they might retain counsel and to be confronted with the need for specific consideration of whether they did or did not choose to waive the right."

3. Privilege Against Self-Incrimination: The Fifth Amendment to the U. S. Constitution states that "no person . . . shall be compelled in any criminal case to be a witness against himself. . . ." The Court ruled that ". . . juvenile proceedings

to determine 'delinquency,' which may lead to commitment to a state institution, must be regarded as 'criminal' for purposes of the privilege against self-incrimination." Therefore, ". . . the constitutional privilege against self-incrimination is applicable in the case of juveniles as it is with respect to adults."

4. Right to Confrontation and Cross-Examination: The Sixth Amendment to the U. S. Constitution states "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted wtih the witnesses against him." This principle is now applicable to the adjudication stage of delinquency hearings. If there is no voluntary confession of the alleged delinquent behavior after a proper notice to the child of his right to remain silent, there must be" . . . confrontation and sworn testimony by witnesses available for cross-examination" in order for a juvenile court to make an adjudication of delinquency.

5. Rights in Waiver Cases: *Kent* established procedural rights governing the exercise of the juvenile court's waiver jurisdiction when a child is charged with a felony, and the juvenile court has discretionary authority to hear the case or bind the child over to the criminal courts for trial as an adult. There must be a hearing in juvenile court prior to entry of the waiver order which conforms to the "due process and fair treatment" standards established in *Kent* and followed in *Gault*. The child has a right to counsel; such attorney has the right to examine the juvenile court's social or probation records that will be considered by the court in making its waiver decision. The judge must specify the reasons for waiver in his court order waiving jurisdiction to the adult criminal court.

What is Left of the Juvenile Court Idea?

We have seen that *Gault* applies four Bill of Rights safeguards to delinquency adjudication proceedings: 1) notice, 2) right to counsel, 3) privilege against self-incrimination and 4) right to confrontation. Justice Black comments in his

concurring opinion: "This holding strikes a well-nigh fatal blow to much that is unique about the juvenile courts in the Nation."

Many of the unique features of the juvenile court remain unchanged by *Gault*. These features are discussed at some length in the lucid majority opinion by Justice Fortas. The "processing and treatment" of children charged with delinquency may continue to be separate from adult offenders. Juvenile delinquents need not be classified as criminals. (The Court notes that the term "delinquent" has "come to involve only slightly less stigma than the term 'criminal' applied to adults.") An adjudication of delinquency need not operate as a "civil disability" or disqualify a child "for civil service appointment." The Supreme Court sees no conflict between confidentiality and due process of law: ". . . There is no reason why . . . a State cannot continue . . . to provide and to improve provision for the confidentiality of records of police contacts and court action relating to juveniles." The Court notes that frequently the "rules governing the arrest and interrogation of adults by police are not observed in the case of juveniles," and *Gault* does not imposed such rules in delinquency cases. A child alleged to be delinquent is not entitled to bail, to grand jury indictment, to a public trial, or to trial by jury.

The *Gault* opinion suggests that application of the due process procedural requirements will clarify the court's right to provide treatment, will make a child feel that his rights have been respected and protected so that he will be more willing to be involved in treatment. ". . . The appearance as well as the actuality of fairness, impartiality and orderliness—in short, the essentials of due process—may be more impressive . . . so far as the juvenile is concerned . . . [W]hen the procedural laxness of the '*parens patriae*' attitude is followed by stern disciplining, the contrast may have an adverse effect upon the child, who feels that he has been deceived or enticed. . . . Unless appropriate due process of law is followed, even the juvenile who has violated the law may not feel that

he is being fairly treated and may therefore resist the rehabilitative efforts of court personnel."

The *Gault* opinion recognizes and supports the concept of individualized justice in juvenile delinquency cases: "Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of juvenile court procedure . . . contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected?" The majority opinion is critical of the Arizona juvenile court judge for being primarily concerned with the offense, rather than with the needs and background of the child. ". . . [T]he points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute. The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case. The summary procedure as well as the long commitment were possible because Gerald was 15 years of age instead of over 18."

Indeed, the *Gault* decision suggests that the needs of the delinquent child and his prospects for treatment are the special responsibility of the judge if delinquency is established through due process of law." . . . [I]t is not suggested that juvenile court judges should fail appropriately to take account . . . of the emotional and psychological attitude of the juveniles with whom they are confronted. While due process requirements will . . . introduce a degree of order and regularity to juvenile court proceedings to determine delinquency, and in contested cases will introduce some elements of the adversary system, nothing will require that the conception of the kindly juvenile judge be replaced by its opposite. . . ."

Where Do We Go From Here?

We have seen that the juvenile court has failed to achieve the ideals envisioned by its founders. Is there merit to the

idea of a separate court for children? Do we prefer to abolish juvenile courts and leave children's cases to the regular criminal courts? People may not agree on this point.

The report of the President's Commission on Law Enforcement and Administration of Justice has an answer. "As trying as are the problems of the juvenile courts, the problems of the criminal courts, particularly those of the lower courts that would fall heir to much of the juvenile court jurisdiction, are even graver; and the ideal of separate treatment of children is still worth pursuing. What is required is rather a revised philosophy of the juvenile court, based on recognition that in the past our reach exceeded our grasp. The spirit that animated the juvenile court movement was fed in part by a humanitarian compassion for offenders who were children. That willingness to understand and treat people who threaten public safety and security should be nurtured, not turned aside as hopeless sentimentality, both because it is civilized and because social protection itself demands constant search for alternatives to the crude and limited expedient of condemnation and punishment. But neither should it be allowed to outrun reality. The juvenile court is a court of law, charged like other agencies of criminal justice with protecting the community against threatening conduct. Rehabilitation of offenders through individualized handling is one way of providing protection, and appropriately the primary way in dealing with children. But the guiding consideration for a court of law that deals with threatening conduct is nevertheless protection of the community. The juvenile court, like other courts, is therefore obliged to employ all the means at hand, not excluding incapacitation, for achieving that protection. What should distinguish the juvenile from the criminal courts is their greater emphasis on rehabilitation, not their exclusive preoccupation with it."

This report includes a number of recommendations designed to achieve these aims. There should be youth service agencies at the community level to provide services to the less seriously delinquent youth or to refer them to other

community resources. The range of conduct for which court intervention is authorized should be narrowed; definitions of delinquency should include only offenses which would be considered a crime if committed by an adult. Thus, cases which go into the juvenile court under the narrowed concept of jurisdiction would be the more serious youthful offenders. "Court adjudication and disposition of those offenders should no longer be viewed solely as a diagnosis and prescription for cure, but should be frankly recognized as an authoritative court judgment expressing society's claim to protection." The report further recommends that juvenile court hearings be divided into two parts: (1) an adjudicatory hearing; and (2) a dispositional hearing. This idea seems quite sound and timely in view of the *Gault* decision which guarantees certain constitutional rights to a child during the adjudicatory stage of delinquency proceedings.

There seems to be no essential conflict between the treatment purposes of the juvenile court and due process of law. One could effectively argue that the juvenile court idea has not really been tried with qualified judges, adequate diagnostic skills, appropriate resources, adequate financing or the needed public understanding. The press will play a major role in the future of the juvenile court. There is much news value and human interest—often tragic—in the stories of the children who go before our juvenile courts. If you are allowed to go and to write, perhaps the public will have sufficient information in the future to make its own evaluation of the juvenile corrections system.

REFORMING THE SYSTEM

A. Kenneth Pye

During the last few years our system for the administration of justice has evolved at a revolutionary pace. The crime rate has risen, but the basic questions remain the same. What conduct should be made punishable? What should be done with those found guilty of prohibited conduct? What kinds of procedures should society permit to be utilized in the investigation, apprehension, and disposition of persons accused of crime?

Today, however, the answers to some of these questions are less clear, or quite different, than the answers which would have been generally accepted less than a generation ago.

Some of the premises that underly our system for the administration of criminal justice are being reexamined in the light of empirical data previously unknown or ignored. Experimentation is taking place in areas where change has been traditionally regarded as anathema. The virtues of some of the ancient institutions of the criminal process are being reevaluated. Some procedures which have been tolerated for centuries have been discarded. States have been required to modify customary practices to insure the observance of federal constitutional rights. Research on a national scale is destroying myths concerning offenders, victims and the nature of criminal conduct. There is a growing awareness that the characterization of some types of cases as "criminal" or

"civil" is less significant than the issue of what type of sanction is being exerted against the citizen by the state, and the rights that a citizen should be permitted to exert under such circumstances.

Our system for the administration of justice is truly in a state of transition.

A lawyer of a generation ago would feel much more at home today if called upon to deal with the substantive criminal law than if he were required to deal with the field of criminal procedure. In the substantive field, the reformers are still largely voices crying in the wilderness. A few modern codes have attempted to remove some of the technicalities that confused the law, such as the distinctions between larceny, embezzlement and false pretenses, but there has been little disposition to accept proposed reforms in more controversial areas.

Consentual Sexual Conduct

Many scholars question the wisdom of attempting to punish consentual sexual conduct committed by adults in private —adultery, fornication, homosexuality, sodomy. They argue that these laws are historical relics of an era in which the law attempted to punish conduct deemed to be sinful or immoral and that they have no place in a modern, pluralistic society. In addition, these scholars assert that these laws rarely are enforced, and attempts at enforcement tend to promote conduct by the police that is unacceptable to society, conduct such as invasions of privacy by secretive surveillance and psychological entrapment by vice squad officers. The prestigious American Law Institute determined not to punish consentual sexual conduct by adults in its Model Penal Code, and recently, the British Parliament has reached a similar conclusion. However, the arguments of the opponents of our sex laws have fallen on deaf ears in the state legislatures of the country.

Attempts to liberalize the abortion laws generally have shared a similar fate, but a consensus seems more likely to

develop in this area. An International Conference on Abortion, sponsored by the Harvard Divinity School, brought together clerics, doctors, lawyers and other interested citizens to discuss the wisdom of changes. It seems likely that many states may liberalize their laws to permit abortions when the health of the mother requires, when there are strong medical reasons to believe that the baby may be defective, and in cases of pregnancy resulting from rape or incest. North Carolina, Colorado and California have amended their abortion laws during recent months.

A gradual appreciation that too much is being expected of the criminal law in the regulation of business activities also is developing. Many of our laws proceed upon the assumption that the best, or only, way to discourage undesired business conduct is to make the conduct criminal. Consequently, our codes contain many business offenses, usually misdemeanors, that are frequently dead letters on the statute books. Even more frequently these offenses are punished by fines viewed by the corporate defendant as one of the costs of doing business ultimately to be transmitted to the customer. There are usually other and better ways than the criminal law to persuade businesses to abstain from undesired conduct and more effective institutions to regulate businesses than the criminal courts. The power to issue stop and desist orders, to seek injunctive relief, to license, to tax and a host of other devices are available and probably will be used to a greater extent in the years to come. The sophisticated society of the Sixties requires the judicious use of the many different available types of societal sanctions to encourage conduct deemed to be desirable and to deter conduct thought to be contrary to the public good. The criminal law approach of combining a prohibition with a punishment has the virtue of simplicity, but lacks the flexibility necessary to deal with the broad field of business activity in which regulation is required.

The Issue of Criminal Responsibilities

Perhaps the greatest controversy in recent years revolves

around the issue of criminal responsibility. This broad subject includes within its ambit such diverse issues as when a defendant should be excused from criminal responsibility because of his mental condition, the responsibility of juveniles, and the status of chronic alcoholics and dope addicts. The law's attempt to wrestle with these problems frequently involves a type of circular reasoning. A decision that a person should not be held responsible necessitates the conclusion that he has not committed a crime, and hence should not be punished, although his condition may be such that he should be treated. On the other hand, if we conclude that a class of persons should be treated rather than punished, there seems to be a tendency to conclude that the members of the class should not be held responsible for their acts. At the same time, most students of the process accept the thesis that one of the purposes of modern penology is the rehabilitation of offenders who have been determined to be responsible. Thus, a theoretical conflict sometimes arises over whether a defendant should be held responsible and rehabilitated, or held not to be responsible and treated. In some cases the actual disposition of the offender may be the same, in that if convicted he may receive psychiatric treatment within the prison system, while if found not responsible, he may receive similar treatment in a mental hospital. Even in this case the stigma attached to his status may be different. Frequently, however, the prison system may have no facilities for dealing with the defendant's mental problems. A determination of responsibility may mean that a defendant will be temporarily incapacitated from committing an offense because of his incarceration, but, when released, his underlying mental condition will soon manifest itself in repeated criminal conduct. The classic examples are our chronic alcoholics, who throughout their lives receive sentences of $30 or 30 days interspersed between drinking bouts. The issue of mental responsibility reaches its greatest significance in capital cases, where the decision as to responsibility may determine whether a defendant is hospitalized or hanged.

All jurisdictions recognize that it is unfair to apply the sanctions of the criminal law to a person who is not responsible for his acts because of a mental illness, disease or defect. They do not agree on the test that should be used to determine whether a person committing an anti-social act was "responsible" at the time of its commission. The traditional test in our country was that laid down by the House of Lords in *M'Naghten's* case in 1843. Basically, the rule holds responsible any person who is capable of knowing the nature of his act, or that what he was doing was either wrong, or contrary to law, regardless of the degree of his mental illness. Some states have an additional exception excusing acts done as a result of an "irresistible impulse" caused by an unsound mind.

In 1954 Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia Circuit enunciated a new test in the landmark case of *Durham v. United States*. Chief Judge Bazelon argued that there were some individuals who were not responsible for their acts even though they could perceive the difference between right and wrong. The Court held that a person should not be subjected to the penalties of the criminal law if his act "was the product of a mental disease or defect." The test was two-fold: (1) Did the defendant have a mental disease or defect at the time he committed the act? (2) Was his act the product of his mental disease or defect? "Mental disease or defect" was subsequently defined as including "any abnormal condition of the mind that substantially affects mental or emotional processes and substantially impairs behavior controls." No other court has so far adopted the *Durham* rule. However, it gave impetus to reexaminations of the wisdom of the *M'Naghten* rule, and they are still being conducted.

The American Law Institute modified the *M'Naghten* rule to include the faculty of volition as well as cognition in its Model Penal Code. The A. L. I. text provides: "(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrong-

fulness] of his conduct or to conform his conduct to the requirements of law."

The A. L. I. formulation differs from the *M'Naghten* rule in two ways. In the first place, it is concerned with the defendant's capacity to appreciate the wrongfulness of his conduct, instead of whether the defendant knows what he is doing is wrong. Appreciation requires a value judgment not implicit in knowledge. Even more significant is the recognition that a person is not responsible, even if he appreciates that his conduct is wrongful, if he lacks the substantial capacity to conform his conduct to the requirements of law.

Three state courts and four federal courts of appeal have adopted the A. L. I. standard without legislation. Six other state legislatures have enacted statutes that follow the A. L. I. model with minor variations in language.

Most states have done nothing, relying upon the discretion of trial judges and juries to avoid a strict application of the *M'Naghten* doctrine. State courts seem inclined to defer to legislatures, and legislatures seem prone to remain quiescent until an unusual case sparks action. In 1966 in Maryland, a former congressman's wife who had been under psychiatric care killed her children. She was clearly psychotic and would not have committed the homicides in the absence of the mental disease. However, she knew that killing her children was wrong and hence was convicted by a jury under a *M'Naghten* instruction. The Maryland legislature promptly determined that the maintenance of public order in Maryland did not require the incarceration of persons whose acts are caused by mental disease. Similar enactments in other jurisdictions undoubtedly will occur during the coming years. We may hope that all will not require a *cause celebre* before they act.

Drug Addicts and Chronic Alcoholics

An appreciation that there are people who are not capable of controlling their conduct because of their mental condition is also evidenced in recent court decisions dealing with drug

addiction and chronic alcoholism. In 1962, in *Robinson v. California* the Supreme Court of the United States reviewed a California statute that punished narcotics addiction. The Court concluded that addiction to narcotics was a disease and held that punishment of the defendant for addiction constituted the imposition of a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. The Court distinguished the California statute, which punished the accused for his "status as an addict," from other enactments that punish a person for the use, purchase, sale or possession of narcotics, or for anti-social or disorderly behavior resulting from their administration. Prosecutions for these offenses involving "irregular behavior" or "anti-social conduct" have continued, despite claims of cruel and unusual punishment and assertions that addiction constitutes a mental disease entitling a defendant to a judgment of not guilty by reason of insanity.

In the *Robinson* case the Court intimated that the states could compel addicts to accept treatment for their affliction, even if it could not label addiction as a crime. This dicta has given considerable impetus to enactment of drug addiction commitment statutes. Many states have for some time authorized the commitment of addicts in the same manner as the mentally ill, but few addicts have in fact been committed. In 1961 California passed a special statute dealing with the commitment of addicts, and since the *Robinson* opinion, New York, Massachusetts and the federal government have enacted similar measures.

As Professor Dennis S. Aronowitz has recently pointed out, these new statutes are essentially similar in philosophy and approaches. All permit the involuntary commitment of persons addicted to drugs who are neither charged with nor convicted of crime. Under all except the California program, some addicts who are charged with crime may volunteer for commitment in lieu of standing trial on the criminal charges. Furthermore, addicts who have been convicted of crime, with some exceptions, may be committed by the courts for treat-

ment instead of being sentenced to terms of imprisonment. Addicts committed under these acts will receive treatment initially in specialized centers and later as outpatients. Proponents of these statutes believe that addicts can be cured of their psychological dependence upon drugs by such treatment programs.

Last year the rationale of the *Robinson* decision was extended by the United States Court of Appeals for the Fourth Circuit, which overturned a North Carolina conviction of a chronic alcoholic for the offense of public intoxication on the ground of cruel and unusual punishment. Public intoxication was viewed as the "involuntary symptom" of the "status" of chronic alcoholism. Unlike the California statute involved in *Robinson*, the North Carolina statute did not punish a status *per se*. North Carolina made no attempt to punish the defendant for being a chronic alcoholic. He was punished for appearance in public while intoxicated. Nevertheless, the Court thought that the public drunkenness and the chronic alcoholism of the defendant were so intimately connected as to be inseparable. The Fourth Circuit case has been followed by the Court of Appeals for the District of Columbia Circuit.

Both of these decisions were careful to point out that states could provide for the detention, treatment and rehabilitation of alcoholics. The cases simply preclude a criminal conviction for conduct symptomatic of the condition of alcoholism. Some states, such as North Carolina, already have appropriated funds for the construction of alcoholic rehabilitation centers. Some states, such as Maryland and Virginia, have recently initiated programs designed to deal with the problem of alcoholics. Other states have taken no steps to provide for the treatment of alcoholics whose imprisonment may be prohibited by the Constitution.

Treatment Instead of Punishment

I shall not comment on the subject of the treatment of juveniles in view of Professor Thomas's discussion. It is sufficient for my purposes to note that the disposition of juveniles,

the insanity defense, the cases involving drug addiction and chronic alcoholism, civil commitments of the mentally ill, and the sex psychopath laws of some of our states, all have elements in common. They constitute a divestment by the criminal law of cases that formerly fell within its cognizance. Indeed, some astute comentators such as Professor Nicholas Kittrie of American University and Professor Kenneth Penegar of the University of North Carolina have regarded the trend as a movement towards the therapeutic state, in which treatment replaces punishment as the central instrument of social control. Such conclusions may be premature, but it does seem clear that the criminal law of tomorrow will refrain from imposing sanctions upon several classes of people who engage in anti-social activities and who traditionally were subject to its rigors. Society will be required to develop other institutions such as rehabilitation centers for alcoholics and addicts to deal with the problems caused by such persons. The failure to develop such institutions will create a substantial danger to the public, if the anti-social actor cannot be imprisoned.

The creation of such new institutions will, also, require careful consideration of the kinds of procedures which should be utilized in determining which persons should be committed, the length of their commitment and what happens to them within the institution, if the rights of the mentally ill, the juvenile, the addict, and the alcoholic are to be protected. We must be careful to remember Edward de Grazia's admonition that "medicine can be a sort of punishment, *sans* due process of law." Protection of the rights of individuals is as important in the treatment centers of a therapeutic *parens patriae* as in the punishment-oriented criminal courts. Already one court has indicated that it will examine where an involuntarily committed patient actually is being treated, when a deprivation of liberty is sought to be justified on therapeutic grounds. Another has insisted that a respondent in an involuntary commitment proceeding must be entitled to the rights guaranteed by the Fifth and Sixth Amendments to a defendant in a criminal case.

Dispositional Alternatives

The question of what disposition should be made of those who offend against the criminal law continues to be a major problem for our system for the administration of justice. Today it is generally accepted that the punishment imposed should be tailored to fit the offender as well as the crime. However, attempts to apply the maxim frequently spotlight the basic problem that the criminal law has several purposes and that any given sentence may not be able to effectuate all of these purposes to an equal extent. Modern criminal law has among its objectives elements of retribution, deterrence of the offender and others, incapacitation of the offender, education of the community, and rehabilitation of the offender. Many modern scholars claim that rehabilitation of offenders is the principal purpose of the criminal law and that the system has no place for the concept of retribution. Few would deny, however, that deterrence is still a principal aim of punishment. Some behaviorists would question its efficacy, but as Professor Norval Morris recently has reminded us, we really know very little about it.

One of the major problems is that the purposes of punishment must be closely related to the causes of crime, and we still know very little about crime causation. Criminologists and psychiatrists offer competing theories. Too often the lawmakers pay attention to neither. It was a great disappointment to many observers that the National Crime Commission did not attempt to study the subject in depth.

In addition, inadequate facilities or resources frequently preclude any realistic efforts at rehabilitation. A rehabilitation-oriented judge may think twice before ordering probation for a youthful offender when he knows that the probation officer is poorly trained, his caseload already exceeds one hundred, and no funds are available for psychological or psychiatric assistance. Furthermore, Dean Francis A. Allen has forcefully demonstrated that the rehabilitation ideal has inherent limitations.

Often a judge will have to determine for himself what par-

ticular purpose of the criminal law should be given precedence when he attempts to individualize the punishment to be imposed upon a given offender. The doctor found guilty of tax evasion is unlikely to repeat his crime, but a suspended sentence may not provide the desired discouragement for other potential tax evaders. Hanging a murderer will not rehabilitate him, but it certainly prevents recidivism. A lengthy sentence to a youthful car thief is unlikely to reform him, but an indefinite sentence to a special rehabilitation center may achieve good results, and have a deterrent effect equal to that of the sentence of imprisonment.

The multi-purpose nature of our system may preclude consistency in punishments, but it does not follow that reform in the sentencing process may not be possible. In the first place, we can broaden the sentencing alternatives available to judges. We can also improve their access to information which is relevant to the issue of the kind of sentence which should be imposed. We can educate the judges concerning the standards which should be applied in sentencing. We can broaden the scope of appellate review in order to deal with the problem of individual abuses of discretion. Progress is being made in all of these areas.

In many jurisdictions a judge no longer is required to choose between a suspended sentence and imprisonment for a fixed term. The federal statutes provide an illustrative example. The judge may sentence a defendant to an indeterminate sentence, i.e., a sentence which sets a minimum and a maximum, with the minimum not exceeding one third of the maximum. How long the defendant will remain in prison after he serves the minimum, but before he serves the maximum, will depend upon the extent to which he is rehabilitated in the eyes of the correctional authority, which may, in its discretion, release him at any time after he serves the minimum and before he serves the maximum. The judge might determine to fix the maximum sentence of imprisonment to be served and also provide that the defendant may become eligible for release at any earlier time designated by the correctional author-

ity. This alternative permits a judge to grant greater discretion to the correctional authorities. The judge may determine to place the defendant on probation and impose such conditions as he may deem desirable, if he thinks the interests of society will better be served by the supervision of a probation officer rather than imprisonment. In unusual cases the judge may sentence a defendant to a term of not more than six months with the provision that he shall then be placed on probation. He may fine a defendant when he concludes that neither imprisonment nor probation is required.

Separate provisions may be invoked by a judge in the case of youth offenders (under 22 years of age) and young adult offenders (between 22 and 26 years of age). Mention already has been made of statutes confirming special dispositional authority, such as the power to send a narcotics addict to a rehabilitation center in lieu of imprisonment.

Need for Presentencing Information

These alternatives provide much greater flexibility in sentencing than the jail or suspended sentence alternatives of by-gone days. However, it may be difficult or impossible for a judge to choose from among these alternatives wisely unless he has access to detailed information concerning the offender. To sentence intelligently in many cases, the trial judge must know the answers to questions such as whether the offender is dangerous, whether he will be helped or harmed by prison, whether he is mentally and emotionally capable of profiting from probation, whether his attitude towards society is such as to justify the use of probation instead of incarceration, whether it is compatible with sound public policy to grant probation considering the nature of the offense committed by this defendant in his particular social mileau, whether granting probation will be construed by the defendant as "beating the rap" and similar factors. The judge cannot be expected to find the answers to all of these questions by himself, and the defendant and the prosecutor frequently will be unable to fill the void. Today in a number of jurisdictions, information

of this sort is brought to the attention of the judge by a probation officer who files a presentence report which in actuality is a case history of the offender, describing his offense and prior offenses, if any, together with their disposition, as well as a description of the offender in terms of his health, character, relationships and sociocultural background. Presentence reports are being used in cases involving approximately 90% of all convicted persons in the federal courts, and some state systems are also utilizing them.

In unusual cases, the probation officer may not be able to ascertain the needed factual information. In the federal system the trial judge may delay the fixing of sentence in such a case. He may commit the defendant to the correctional authority for a period of three months during which the prisoner will be given physical, psychological, and psychiatric examinations. The correctional authority then must make a detailed report to the judge with a recommendation. The judge determines the sentence to be imposed after receiving the advice of experts who have studied the offender closely.

One of the most recent changes in the administration of criminal justice is a new understanding of the role of defense counsel at sentencing. Most persons who are charged with crime are convicted, and many of the convictions result from pleas of guilty. Sentencing is therefore the crucial phase of the criminal process for most defendants. Too often in the past a lawyer has viewed his function at sentencing to be limited to a plea for leniency. Today more counsel are appreciating that the plea of leniency is only as good as the factual basis upon which it rests. The defense counsel must conduct an independent investigation utilizing available community resources, and he must produce a specific probation program as a reasonable alternative to imprisonment in appropriate cases if he is to be effective. Few lawyers have training or experience in the performance of such tasks, but competent representation at sentencing requires the acquisition of new areas of expertise and lawyers are proving equal to the challenge.

Judges need appropriate standards as well as factual in-

formation in order to sentence intelligently. Few lawyers have the knowledge or experience necessary for the difficult tasks of sentencing when they are appointed to trial benches. During recent years we have accepted the idea that there is nothing degrading about judges studying in order to perform their jobs more effectively. The National College of State Trial Judges is now able to offer summer courses in which judges are able to compare experiences and discuss the relative weight which should be accorded different factors in sentencing, as well as engage in other studies. In the federal system there have been a number of seminars and institutes in which judges have discussed sentence disparity and the appropriate use of various sentencing alternatives.

These discussions have raised substantial questions concerning whether undue weight is being given by some judges to certain factors in sentencing. For instance, it seems clear that in some jurisdictions defendants who insisted on exercising their constitutional right to trial by jury are granted probation less frequently and receive longer terms of imprisonment than defendants who plead guilty. This may result in part from a feeling by some judges that probation should be reserved for defendants who plead guilty. However, the theory behind probation is not leniency, but that the individual placed on probation should and can be rehabilitated without incarceration. Certainly, this is a much sounder standard than one which gives substantial weight to the question of whether the defendant has saved the state the inconvenience of a trial.

The Problem of Sentence Disparity

Sentence disparity continues to constitute a fundamental problem for the system. To some extent the exchange of views among trial judges and the use of indeterminate sentences alleviates the problem. Nevertheless, most jurisdictions regularly produce cases of unusually harsh sentences meted out to certain defendants. Two weeks ago the United States Court of Appeals for the Fourth Circuit expressed its shock at the action of a Baltimore judge who sentenced a defendant to the

maximum term of twenty years for a $47 robbery. Considerable attention is now being devoted to the desirability of review of sentences by appellate courts. The Senate has passed a bill which would permit the appellate review of sentences in the federal system.

Appellate review of sentencing may not obtain general acceptance in the states, but it does seem likely that appellate courts will place limitations on the sentencing prerogatives of trial courts to an extent unknown in the past. One federal court of appeals has reversed a case in which a repeated offender summarily was given the maximum punishment without inquiry concerning his mental condition. Another has required judges in passing sentence to take into account the time a defendant was deprived of his liberty while awaiting trial. Appeals are pending in a number of jurisdictions in cases where defendants contend that the imposition of the death penalty constitutes cruel and unusual punishment and a deprivation of the equal protection of the law.

In some jurisdictions a defendant who receives a sentence of less than the maximum is required to play Russian Roulette if he wishes to appeal. If he obtains a reversal on appeal, and is convicted again on retrial, he may be sentenced to a longer term of imprisonment than he received originally. Thus, in a recent case in North Carolina, a defendant was sentenced to prison for a term of five years. Subsequently, his conviction was set aside by a federal court on the ground that he had been deprived of a constitutional right. He again was convicted, and this time he received a sentence of twenty years. The Supreme Court of North Carolina saw nothing wrong with such a procedure. In its opinion, a defendant should be expected to accept the hazards as well as the benefits of an appeal. Such reasoning constitutes a thinly disguised attempt to discourage appeals and collateral attacks on convictions by holding a club over the head of a defendant who has been deprived of his rights, but who has received less than a maximum sentence. In June, the United States Court of Appeals for the Fourth Circuit held that such a procedure constitutes

an unconstitutional condition to the exercise of a defendant's right to a fair trial, denies a defendant the equal protection of the law and places him twice in jeopardy for the same offense. Authority on the point is split, but I have no doubt that the view of the Fourth Circuit will prevail.

Defendants Who are Not Convicted

Our system for the administration of criminal justice is becoming increasingly interested in the disposition of defendants who enter the criminal process, but who are not convicted.

A prosecutor in most American jurisdictions has wide discretionary powers. He may choose not to prosecute a case when he thinks the evidence is too weak to convince a jury; when he thinks a defendant is innocent; when he disbelieves the police; when the police have violated the defendant's rights during their investigation; when he thinks a guilty defendant has learned his lesson and no societal purpose would be served by a judgment of conviction; or for other reasons. In some jurisdictions, prosecutors decline to prosecute a high percentage of cases presented to them. Few question the wisdom of entrusting such discretion to prosecutors. However, some students of the process have suggested that there is a need for more clearly defined standards for the exercise of discretion. The purposes of the system require that the determination of what cases should be prosecuted must be coordinated with the policies that underly the punishment of those who are convicted. A judicial policy of imposing stiff sentences in weapons cases can lose much of its efficacy if prosecutors are declining to prosecute a substantial percentage of the weapons cases brought to their attention.

The desirability of a system of "probation without conviction" for selected offenders deserves more attention than it has received. Since 1946, federal probation officers in some jurisdictions have been supervising cases of "deferred prosecution of juvenile offenders." Carefully selected juvenile offenders who neither have been subject to a proceeding under the Juvenile Delinquency Act nor have been convicted of any offense

may be placed under the supervision of a probation officer if the juvenile consents and the federal court approves. The philosophy underlying the program is based on the belief that some juveniles are capable of correction without prosecution and that the juvenile benefits from an avoidance of the stigma of a court record. There appears to be no statutory basis for the program, and little is known of its operation. If it works with juveniles, it may be appropriate to extend it to youthful adults.

Some defendants who are charged with crime are found incompetent to stand trial. These defendants may be responsible for their acts but are unable to understand the nature of the criminal proceedings in which they are involved, or unable to cooperate in their own defense. There is obviously a sound basis for delaying trial until they are competent. Unfortunately, some of these people never regain competency. There are records of defendants whose tenure in a mental hospital greatly exceeds the maximum punishment that could have been imposed for their offenses. Some of these people are dangerous and subject to commitment under civil commitment statutes. Others constitute no danger to themselves or others and should be entitled to release, if no trial is likely to ensue.

In many jurisdictions a defendant found not guilty by reason of insanity is entitled to his release. Such a result does not make sense and is not necessary. Modern statutes permit an automatic committal to a mental hospital upon an acquittal by reason of insanity. The rights of the defendant can be protected adequately by permitting him to obtain his release promptly upon proof that he no longer suffers from a mental disease that renders him dangerous.

We have not yet reached the point of follow-up on any defendants who have been acquitted. Frequently, the defendant who has been acquitted will be plunged back into an environment with which he is unable to cope. He may need as much assistance in solving his problems as the convicted defendant who is on probation. Today we are beginning to appreciate

that the criminal process does not exist in a vacuum. We reasonably can expect such social services to be developed during the coming years.

Procedural Reform

The most significant reforms in our system for the administration of criminal justice during recent years have occurred in the field of criminal procedure. The Supreme Court of the United States has provided the principal leadership, but innovations have also been instituted by the Congress, some of the lower federal courts, notably the United States Courts of Appeals for the District of Columbia Circuit, and the United States Courts of Appeals for the Fourth Circuit, some of the state appellate courts, notably those of California and New York, and some of the state legislatures. It is probably fair to conclude that there have been more important changes in criminal procedure during the last decade than in the total history of criminal procedure in America before 1957.

Most of the changes have emanated from the Supreme Court of the United States. During recent years approximately one quarter of the Court's opinions have dealt with the criminal law. From these opinions two distinct trends seem to emerge. Frequently, they coalesce in specific cases.

There is a clear trend towards equality of protection in procedural safeguards. It has two facets. In the first place, the poor man under police investigation, or charged with crime, is entitled to the same rights and privileges as the wealthier citizen. While absolute equality is not required—and, indeed, probably cannot be obtained—"invidious discrimination" between the rich and the poor in the administration of criminal justice must be avoided. This doctrine was forcefully articulated eleven years ago in *Griffin v. Illinois* in which the Court required that the state provide a trial transcript to an indigent at state expense for the purpose of an appeal, if a wealthy citizen could appeal by paying for the transcript. In the last decade the *Griffin* case has spawned an impressive progeny in cases requiring that a state permit an appeal in *forma pau-*

peris to an indigent if a more affluent defendant could appeal by paying the established filing fees, and in the landmark cases that require the states to provide counsel for an indigent charged with a felony at trial and for at least one appeal. Although not the expressed reason for the decision, the doctrine was a persuasive factor in the recent requirements for providing procedural safeguards to indigents during police interrogations. The entire approach of the Supreme Court towards the administration of criminal justice has been colored by this quest for equal treatment. Traditional practices are now subjected to a critical reappraisal dictated by the realization that most of the people who run afoul of the criminal law are the poor, the uneducated and members of minority groups.

The movement towards equality has another dimension also. There is a clear trend towards requiring state courts to provide defendants with the same basic rights as federal courts are obligated to provide by virtue of the Bill of Rights. The Court has gone far towards insuring that the same basic standard of procedural fairness is observed in State and federal courts by decisions that require the appointment of counsel for indigents in every felony case; prohibit the admission of evidence obtained as a result of an unlawful search and seizure; guarantee the federal privilege against self-incrimination to a witness in a state proceeding; deny prosecutors the right to comment on the defendant's failure to testify; and obligate them to reveal evidence favorable to a defendant; insure the defendant's rights of confrontation, compulsory process for witnesses, and the right to a speedy trial; apply the same requirements for interrogation, and lineups whether conducted by state or federal police; and impose the same basic procedures for the resolution of the issue of the admissibility of a confession at trial. The Court has not sought to make state and federal criminal procedure the same. However, most of the basic rights enshrined in the Bill of Rights are now available to a defendant whether he is tried in a state or federal court.

Deprivation of Constitutional Rights

Perhaps the most significant changes in state criminal procedure have been caused by opinions broadening the scope of review in cases where prisoners seek to attack collaterally their state court convictions in federal courts upon the ground of deprivation of constitutional rights. The Supreme Court has recognized that there may not be spontaneous compliance with its new requirements and that it cannot possibly review all of the cases from state courts involving claims that the rights have been denied. In the past, the jurisdiction of the lower federal courts to inquire on a writ of *habeas corpus* into the circumstances surrounding a conviction by a state court was severely limited. In 1963, the Supreme Court broadened the scope of review considerably in the cases of *Fay v. Noia* and *Townsend v. Sain*. Federal courts may now make an independent evidentiary examination into alleged constitutional violations in a state prosecution, after trial and appellate proceedings are complete, unfettered to a large extent by state procedural rules. Whether the constitutional issue was raised or not in the state courts is immaterial to federal *habeas corpus* jurisdiction, although the federal judge in his discretion may decline to review the defendant's contention of constitutional error if he finds that the defendant either deliberately by-passed state procedures, or had a full hearing on the point in the state court. These opinions have been accompanied by other cases in which the Supreme Court broadened the power of federal courts to enjoin state criminal proceedings and expanded the scope of its own inquiry in direct reviews of state court convictions.

Principles of federalism have yielded to the necessity of protecting the rights of the individual. These new powers in the federal courts give the states the choice of guaranteeing the protection of the federal constitutional rights of defendants in their own courts, or having their supreme courts relegated to the status of intermediate courts in a federal hierarchy.

The second major trend in the Supreme Court is the movement towards the implementation of rights to which lip serv-

ice has been paid for generations. The last decade has witnessed an appreciation that the rights guaranteed to the people by a constitution or statutes are less important than the rights which the people are really able to exercise in practice. Thus, the right to counsel was of little use to the majority of Americans charged with crime who could not afford a lawyer, until the states began providing counsel for indigents. The privilege against self-incrimination was of limited significance if the police could obtain confessions by inherently coercive interrogations of citizens who were either ignorant of their right to remain silent or too weak to assert it. The defendant's right to remain silent at trial was illusory, if a prosecutor could comment to a jury on his failure to testify, thereby encouraging the jury to infer guilt from his silence. Requirements of prompt presentation of arrested persons before magistrates were reduced to platitudes if police were permitted to ignore the legislative mandate and use the products of their law-breaking as evidence against a defendant in a court of justice. The liberty of the individual and the sanctity of his home lost much of their meaning if police could arrest or search without probable cause and profit by their wrongdoing, or if artificial rules concerning standing to object preclude judicial scrutiny of police misconduct.

The idea that a search warrant should be obtained from an impartial magistrate before a house is entered and searched is not novel. Nor is the notion that a search of a house without a warrant in the absence of exigent circumstances is unconstitutional. What is new is that the constitutional mandate must be observed if the police wish to use the evidence uncovered by the search. This idea may even be novel to many in a state which already had an exclusionary rule before the Supreme Court decision. Professor Michael Katz's recent study of practice in North Carolina indicates that 18 percent of the trial judges, 34 percent of the prosecutors, and 29 percent of the defense counsel surveyed were unaware that a state statute precluded the admission of evidence obtained as a result of an unlawful search and seizure.

The idea that a defendant has a privilege to remain silent and the right to a lawyer to advise him when subjected to a police interrogation does not shock many Americans. However, the notion that the policeman should inform him of these rights and refrain from interrogating him if he chooses to exercise them causes consternation to many.

Americans have always had the right to the assistance of counsel at a criminal trial. The difference now is that our indigent citizens actually have lawyers.

The great accomplishment of the last decade is the removal of many of the elements of hypocrisy from criminal procedure. Rights given to individuals are now being implemented and enforced. Experience may indicate that the requirements of law enforcement are inconsistent with some of these rights. If this proves to be the case, society may determine to limit the rights of its citizens. Such an approach is far sounder than paying lip service to sham rights which in fact do not exist in practice.

The Powers of the Police

It would be inaccurate to leave the impression that the Court has been concerned exclusively with the rights of the individual. In a number of opinions the Court has reaffirmed or expanded the powers of law enforcement officers to investigate crime. Too often these opinions are ignored in a catalog of the Court's contributions to the reform of our system.

Today there is no good reason why an officer who has probable cause to arrest or search cannot accomplish his obective lawfully if he takes the time to apply for a warrant in the manner in which the Court has clearly set forth in a series of opinions. The Court has been most reluctant to set aside arrests or searches where warrants were obtained by officers who revealed the facts underlying their conclusion of probable cause to an impartial magistrate. It has permitted police determination of probable cause to be based in large part on information provided by informants, and generally permitted the police to conceal the identity of an informant from a curi-

ous defendant before trial. It has upheld arrests without warrants and searches incident to such arrests where probable cause existed to believe that the suspect had committed an offense, although the police had adequate time to obtain a warrant and chose not to avail themselves of the opportunity. The Court has permitted: search without a warrant of moving vehicles, when there is probable cause to believe that they are carrying contraband; entries into houses without advance warning of the officer's identity or purpose, where there were "exigent circumstances"; and search of a dwelling without a warrant for the purpose of finding the defendant or weapons in a case of "hot pursuit." Recently, the Court has placed its imprimatur upon searches to locate nontestimonial evidentiary materials, despite a long federal history limiting lawful searches to contraband and the fruits or instrumentalities of crime.

It has also rejected contentions that police officers should not be permitted to use informers and undercover agents. Although the Court set aside a conviction involving the identification of a defendant at a lineup conducted in the absence of a defense counsel, it made it clear that legislation eliminating the risks of abuse and unintentional suggestion at lineup proceedings may also remove the basis for requiring the presence of counsel. In June, 1967, it declared a New York electronic surveillance statute to be unconstitutional, but suggested that a more restricted statute might be constitutional. The Court has permitted spontaneous confessions and statements by a defendant as a result of police interrogations if the government is able to establish that the defendant voluntarily waived his right to remain silent after being warned of his privilege against self-incrimination and his right to counsel. It has specifically refrained from imposing upon the states the strict federal rules that exclude evidence obtained during a period of unnecessary delay between arrest and presentment before a committing magistrate and evidence obtained by wiretapping unlawful under the federal statute.

On balance, it must be conceded that police powers have

been reduced as a result of the Court decisions during the last decade. However, it is certainly unjustified to conclude that the police have been handcuffed.

The Court has permitted the police to engage in the tactics necessary to solve most crimes. There may be some "solitary killers where the only witnesses to their crimes are dead" who may escape punishment by asserting their constitutional rights. These are the cases that cause the most public furor, because, as the National Crime Commission has pointed out, "the public fears most the crimes that occur least often, crimes of violence." However, many of these offenses are the easiest to solve because most murders, rapes and assaults are committed by persons known to the victim, by relatives, friends or acquaintances. The District of Columbia Crime Commission study revealed that almost two-thirds of rape victims surveyed were attacked by persons with whom they were at least casually acquainted. Eighty-one percent of assault victims were acquainted with their assailant. In Philadelphia only 12.2 percent of murders were committed by strangers. Other studies have revealed that a very high percentage of crimes of violence are committed against victims of the same race as the offender. The interracial rape or murder is the exception, not the rule.

Most cases can be solved by competent law enforcement agencies within the guidelines established by the Court decisions. Furthermore, it does not follow that broadened powers of the police will have any significant effect on the number of cases prosecuted or the number of defendants convicted. In the routine criminal cases constituting the bulk of our criminal business, many other factors intervene in the criminal process between the close of a police investigation and the final disposition of the case, which may be much more significant. Factors such as the availability of prosecutors and judges and standards of prosecutorial discretion may be much more significant than the percentage of cases cleared by the police. For example, in 1965 in the District of Columbia only 681 defendants were sentenced to imprisonment as a result

of felony convictions, when over 23,000 felonies were reported and over 12,000 felony arrests were made. Too often we jump to the conclusion that broadened police powers necessarily will result in substantially more convictions.

Contributions of the Congress

The Supreme Court has not been responsible for all of the reforms in criminal procedure. The Congress deserves credit for several important innovations. The Criminal Justice Act of 1964 for the first time provided compensation for attorneys appointed to represent indigents in federal criminal cases. It also provided auxiliary services, such as reimbursement for out-of-pocket costs incurred during investigations, funds to permit the hiring of investigators in special cases, and funds for expert witnesses.

Perhaps the outstanding contribution of the Congress has been in the reform of the bail system. The right to bail possesses little significance for the defendant who is unable to pay a bond premium. For some time we have known that even small bonds are beyond the financial capacity of many defendants. More recently, we have learned that many defendants charged wtih crime may be released on their personal recognizance—without any appreciable danger that they will abscond before trial.

The use of personal recognizance (or other non-financial conditions) can assure pretrial liberty to a substantial number of defendants who in the past have been imprisoned before trial solely because of their inability to pay a bond premium. It also reduces the cost to the municipality, which otherwise would have to pay the direct costs of detention, and frequently the indirect costs of public welfare assistance to the defendant's family. Los Angeles saved $350,000 in direct costs during the first year of its release-on-recognizance program. In addition, it restores rationality to the system. One must wonder what a defendant must have thought of the value of his constitutional right to bail and to a jury trial, when he was incarcerated before trial, when he was presumed to be

innocent because he could not afford a bond, and when he was then released on probation after he was found guilty beyond a reasonable doubt.

The Bail Reform Act of 1966 provides that any person charged with a non-capital offense in a federal court shall be released on his personal recognizance or upon the execution of an unsecured appearance bond unless the committing magistrate determines that a release under such conditions will not reasonably assure the appearance of a defendant at trial. If the judge finds that something more is required to assure the presence of the defendant at trial, he is authorized: to release the defendant in the custody of a designated person or organization agreeing to supervise him; to place restrictions on his travel, associations or place of abode; or to require him to deposit not more than 10 percent of the amount of an appearance bond as security, with the provision that the amount will be returned to the defendant if he appears on the appointed day. The judge is authorized to require the execution of a bail bond with sureties only if he deems that one of these conditions, or a combination of them, provides inadequate assurance of the defendant's presence at trial. If the defendant cannot obtain his release after 24 hours, he is entitled to have the conditions reviewed by the judge who imposed them. The judge is required to state in writing the reasons for the condition imposed if he does not amend the conditions to enable the defendant to obtain his release.

The statute obviously proceeds upon the assumption that the benefit of the doubt should be given to pretrial release. Its administration has disclosed an important problem, somewhat obscured in the past. American law never has permitted the denial of bail because the accused is thought to be dangerous. In fact, however, trial judges have been able to "preventively detain" a supposed-dangerous offender simply by fixing a bond beyond his capacity to meet. Now, for the first time the system is being required to determine forthrightly whether society should be able to deny a defendant his liberty before trial, not because he may flee the jurisdiction, but

because he may commit "another offense." A bill to permit detention of dangerous defendants has been introduced in the Senate.

The Bail Reform Act has also demonstrated that the judges need assistance in order to determine what conditions, if any, should be imposed upon a defendant who seeks pretrial liberty. The problem is akin to that faced by a judge in sentencing. In the District of Columbia the Congress has established a Bail Agency to accomplish this function. In other areas private organizations modeled after the highly successful Vera Foundation Manhatten Bail Project in New York City are providing similar assistance. Unfortunately, similar services are not available to most federal judges.

Legislation designed to reform the bail system has been passed or introduced in a number of states. Special trial projects are operating in many municipalities. The South can take great pride in the leadership it has shown in this area.

Federal Aid to States and Localities

The crying need of our system for the administration of criminal justice is more and better personnel and techniques. This costs money. Our nation is spending $13.7 billion for liquor and $8.8 billion for tobacco. At the same time it spends only $2.8 billion for all police, and only $4.2 billion for all criminal justice—police, prosecution, courts and corrections. While the administration of criminal justice is a matter of national concern, the responsibility for law enforcement is primarily a matter of local or state concern. Frequently, however, state and local governments do not have or will not allocate the resources necessary to train their law enforcement officers or bring up-to-date their law enforcement techniques.

To encourage state and local governments, to meet these needs, the Congress enacted the Law Enforcement Assistance Act of 1965. This measure authorized the Attorney General (1) to make grants and enter contracts for the establishment, improvement, or enlargement of programs and facilities for

the training of state and local law enforcement, correctional and crime prevention personnel, and (2) to make grants and enter contracts for the support of demonstrations and other projects designed to improve the techniques, practices, and capabilities of state and local law enforcement agencies. The Act has been in effect for almost two years, and some 266 grants have been made. It has proved to be an excellent example of "creative federalism," although the funds available have been limited.

A new bill, The Crime Control Act of 1967, has been passed by the House and is pending before the Senate. The purpose of this bill is to broaden the extent of federal support to state and local programs designed to improve the administration of justice. The Attorney General would be authorized to make grants on a broad basis to increase safety from crime in homes and streets, provide equipment designed to increase the effectiveness and improve the deployment of law enforcement and criminal justice personnel, assist the recruitment, education, and training of all types of law enforcement and criminal justice personnel, improve the management and organization of law enforcement and criminal justice agencies and functions, develop community relations programs, assist programs of public education relating to crime prevention, and aid operations and facilities for increasing the capability and fairness of law enforcement and criminal justice, including the processing disposition and rehabilitation of offenders. The bill would even authorize grants for the construction of physical facilities that fulfill a significant innovative function.

In the House, the bill was amended to authorize grants for the establishment and operation of state planning agencies, which would have the responsibility of developing comprehensive statewide plans. In effect, the state organization would be an intermediary to screen applications and distribute funds to local communities. Indeed, the bill as amended would authorize $22,500,000 in grants for the purpose of establishing and operating the state planning agencies, while only $39,000,000 would be available for the 18,000 cities, 3,000 coun-

ties, and countless smaller units on the real front in the war against crime. Federal funds would be distributed in block grants to the states rather than on the basis of need and willingness and capacity to innovate.

There can be little objection in theory to state planning. In practice, however, it assumes a law enforcement structure within each state that simply does not exist in many jurisdictions. All the states, except Hawaii, have some form of state law enforcement body. Some have general policing authority, but many are restricted to the functions of enforcing traffic laws and protecting life and property on the highways. To a greater or lesser extent, they may provide logistical services such as maintaining a state system for criminal identification, conducting police training programs or providing state communications systems. Few have the authority or the expertise to fill the coordinating role that the amended bill would impose upon them. There can be little doubt that the states should develop such coordinating bodies. There can be considerable doubt that the limited federal money available can best be spent by paying 90 percent of the costs of establishing and operating such agencies. In March of 1966 the President asked the Department of Justice to work with the states to establish statewide committees on law enforcement and criminal justice. Only one-half of the states have indicated an interest and of that number, only about one-half have actually begun to produce plans. It seems clear that the House amendment, if accepted by the Senate, will result in delay and waste of funds as new committees are appointed and local communities apply pressure for a piece of the pie. The Crime Control Act of 1967 may in fact become a patronage distribution act.

Another title of the bill would authorize the establishment of a National Institute of Law Enforcement and Criminal Justice, which would conduct research and training projects and establish and operate regional institutes for the training of state and local law enforcement personnel. Such a project could yield rich dividends in the years to come, but its details deserve separate consideration. A separate bill would be more

appropriate than tacking the general scheme on the grants-in-aid legislation.

Two other measures on the federal level deserve attention. Congress has established The National Commission on Reform of Federal Criminal Laws. Professor Louis Schwartz is directing an ambitious project that should not only remove much of the existing confusion and inconsistencies in federal law, but provide a model for state code revisions as well. The Congress is also considering a wide-scale reform of the United States Commission System. A bill which would replace United States Commissioners with a system of federal magistrates has been passed by the Senate and is now pending in the House.

Directions for the Future

The changes of the last decade have unalterably changed the course of American criminal procedure. Reasonable men may differ as to whether all of the changes were reforms, but no student of the process can fail to see the general directions in which our criminal procedure will continue to evolve.

To a large extent, the coming years will be an era of implementation and enforcement of the doctrines enunciated during the last decade rather than a period of fundamental change. The Supreme Court has provided the outlines of the criminal procedure to be followed in a civilized society. It is up to the states to translate these principles into reality and to accommodate their procedures to the Supreme Court model. The states have been presented a great challenge. It remains to be seen whether they will be equal to it.

Some may choose to sit back and criticize Supreme Court justices as "judicial activists," or complain that too much attention has been given to the rights of criminals and not enough to the rights of the public, or complain about "sociological jurisprudence." Others may exhaust their energies in futile attempts to deprive the Supreme Court of its jurisdiction to review certain types of criminal cases or to amend the Constitution to provide that every person is presumed to know his rights, and to permit prosecutors to comment on the de-

fendant's exercise of his rights. Others may simply do nothing, adopting the view that they will take no action until the Supreme Court requires it, regardless of the clear thrusts of the opinions.

Such attitudes border on nihilism. The immediate result of a failure to implement Supreme Court decisions is the reversal of state judgments. Two examples will suffice. In 1964 the Supreme Court held that primary responsibility for determining the voluntariness of a confession should rest with the judge and not the jury. An article in the *Mercer Law Review* promptly noted that the Georgia rule was to the contrary. However, Georgia made no effort to change its procedure, with the result that earlier this year a case was reversed by the Supreme Court in an 8-1 decision simply reiterating what the Court had said three years earlier.

In 1961, the Court held that the use of a spike mike driven into a party wall in order to overhear conversation in an adjoining house violated the Fourth Amendment in a federal case. The next year, the Court held that the Constitution prohibited the admission of evidence obtained in violation of the Fourth Amednment in a state criminal case. In 1963, Virginia's highest court affirmed a conviction that rested in part upon evidence obtained through the use of a spike mike. The Virginia Court drew the specious distinction that in the earlier Supreme Court case a spike mike had been "driven" into the wall, while in the Virginia case it had only been "stuck in" the wall. The Supreme Court heard oral argument on and issued a *per curiam* opinion reversing the case one week later. Unfortunately, this is not the only *per curiam* reversal resulting from a failure to follow the law as declared by the Court.

Even more significant than the reversal of individual cases may be the erosion of the principles of federalism as a result of a consistent failure by state courts to enforce constitutional mandates. Re-examination of the judgments of state supreme courts by the lowest federal courts will become the rule instead of the exception.

Fortunately, these factors seem to be understood, and state

legislators and judges, with some notable exceptions, are undertaking the task of reexamining state procedures in the light of the recent decisions. The task is formidable.

All states now provide counsel for the indigent in felony trials. However, a substantial number do not provide counsel at preliminary examinations, thereby taking the risk of a constitutional violation if a preliminary examination turns out to be a "critical stage" in a specific case. Furthermore, many states do not provide counsel in misdemeanor trials on post-conviction proceedings. The authorities disagree at present, but the Supreme Court undoubtedly will require counsel in all criminal proceedings if the alleged offense is punishable by any substantial loss of liberty when an appropriate case reaches it. It is difficult to imagine the Court endorsing a doctrine determining the existence of a right to counsel by whether the state chooses to label a particular offense as a misdemenor or a felony. States that do not provide counsel in misdemeanor cases are operating on borrowed time.

Responsibilities of the States

In an attempt to encourage police officers to seek warrants, the Supreme Court has adopted a very liberal approach towards arrests and searches with a warrant. This favoritism shown to warrants rests upon two assumptions. In the first place, it is assumed that the application for a warrant or the affidavit in support thereof, will reveal the facts underlying the existence of probable cause and the reliability of the source of information. In many states it has been customary for a warrant to issue upon the officer's naked conclusion that there was probable cause to arrest or search. In such states the officer is not required to reveal to the magistrate any of the facts necessary for an independent evaluation of whether probable cause exists. A warrant issued under such circumstances does not meet the requirements of the Fourth Amendment. States permitting such procedures should follow the lead of Georgia and amend their statutes to make it clear that the basis for the officer's conclusion must be stated.

In addition, the Supreme Court has made it clear that the officer who issues a warrant should be an official who exercises independent judicial descretion. In some states warrants may be issued by mayors, clerks of court as well as judicial officers. In many states they may be issued by justices of the peace, who do not necessarily have to be lawyers, and who may happen to be police officers. Assuming, but not conceding, the requisite degree of judicial objectivity, it is doubtful whether many of these persons have the necessary expertise to evaluate applications for warrants in the light of the Supreme Court cases. It is also doubtful that they always understand the role they are expected to play. Witness the example of the assistant clerk of the superior court in my county, who last year testified that he routinely issued warrants upon witnessing the signatures of officers. The states must carefully consider limiting the classes of persons who may issue warrants to individuals who combine both expertise and judicial independence.

Fifteen months ago the Supreme court decided the *Miranda* case, in which it laid down detailed rules for the custodial interrogation of suspects. Basically, it required the police to inform a suspect of his right to remain silent, that anything which the suspect said could and would be used against him, that he had a right to the advice and presence of a lawyer, and that a lawyer would be provided for him if he was unable to afford one. Furthermore, the Court made it clear that the suspect must be permitted to exercise his rights after he is informed of their existence. Interrogation must normally cease if a witness indicates that he wishes to remain silent or to consult a lawyer. A suspect may waive his rights and give a statement, but the government must assume a "heavy burden" to demonstrate that the suspect "knowingly and intelligently" waives his rights.

The extent to which law enforcement agencies are complying with *Miranda* is not clear. The Institute of Government of the University of North Carolina has prepared and distributed an excellent manual to educate law enforcement officers

in its state concerning the new duties imposed upon them by the decision. In some states no similar institution exists and it is quite likely that some policemen have only a vague idea of what *Miranda* requires. Undoubtedly, some law enforcement officers who do understand the holding are ignoring the decision. Others are following the "Dragnet" approach, by going through the rubrics of the warnings as a rote exercise before interrogating as usual. In some jurisdictions there may be a genuine effort to comply with the spirit of the opinions with mixed results. For instance, in the District of Columbia the warnings are usually given, but there is evidence that police frequently are interrogating at the scene of the arrest, or at the stationhouse before an attorney can arrive.

Every state and local community must assume the responsibility of educating its police, concerning their responsibilities for warnings, and either instruct police not to interrogate a defendant who seeks to assert his rights, or make provision for providing him counsel upon request. In Chicago and Phoenix prosecutors and public defenders have agreed to the form of the warnings that should be given, established procedures whereby public defenders will be available when requested, and jointly drafted a waiver instrument, which the police request a suspect to sign if he decides to waive his rights and make a statement. Special difficulties are posed in communities with no public defenders. Nevertheless, some system must be developed.

Recently the Supreme Court held that a police lineup is normally a "critical stage" of the proceeding at which the defendant must be represented by counsel in the absence of waiver. It also indicated that counsel might not be required if police departments took steps that would "eliminate the risks of abuses and unintentional suggestion at lineup proceedings and the impediments to meaningful confrontation at trial." There is good reason to believe that lineups in the absence of counsel are being routinely conducted in many communities throughout the country. There is a substantial risk of contaminating a subsequent criminal prosecution each time a

defendant is identified at a lineup of the kind traditionally conducted by the police. The Supreme Court requirements can be met without interfering unduly with police investigative practices. Again, it is necessary for the states to take prompt action not only to protect the constitutional rights of defendants, but to provide their police with the working tools which they require.

There is a need for speedy improvement in many state systems of post conviction remedies as "the best way to decrease federal intervention in the handling of complaints of injustices made by state prisoners." State trial judges must appreciate the importance of providing a full hearing on any claim of a violation of a federal constitutional right, not only to be fair to the defendant, but to protect the state proceeding from subsequent attack in the federal courts.

Equally important is the education of the personnel who administer state systems for the administration of justice and the improvement of their techniques. The needs of state law enforcement, judicial, and correctional agencies must be determined and proposals prepared with the object of seeking federal support. Any state that is not developing a plan is derelict.

These are only some examples of the areas in which state action is urgently required. Many states are already attempting to respond to the challenge. Several have passed excellent post-conviction statutes. Georgia has new provisions governing search and seizure. Louisiana has a new Code of Criminal Procedure. Few, if any, have statutes and case-law that cannot be improved. A systematic study should be conducted in all states to determine what changes are necessary.

Such studies can profit from outstanding research now being conducted with support from the Ford Foundation by institutes at Georgetown University, the University of Chicago, the University of California, and Stanford University. The studies of the Vera Foundation in New York, The American Bar Association Project on Minimum Standards for Criminal Justice, the work of the American Law Institute on its

Model Code for Pre-Arraignment Procedure, and the monumental reports of the President's Crime Commission can be of assistance. Fundamentally, however, the work has to be done at the state and local level, through organizations such as the North Carolina Institute of Government or by joint efforts of state law enforcement presonnel, judges, lawyers and law schools.

Conclusion

We have no reason to be complacent with our system for the administration of justice, but we have every reason to be proud of the progress we have so far achieved. Some say that history will judge the quality of a civilization by the way in which a society treats those of its citizens who are accused of crime. By this standard, there can be little doubt that America has a fair claim to the title of the world's most enlightened nation. Others would evaluate the effectiveness of the system in terms of the extent to which it has eradicated crime. By this test, we have a long way to go. Perhaps the best standard would combine both factors and ask whether we are doing the best job we can with the resources which are at our society's disposal. We are now in a period of transition where it is difficult to make such judgments. In another ten years we may be in a better position to give an answer.

THE RESPONSIBILITY OF THE NEWS MEDIA

Fred P. Graham

THE RULES GOVERNING the administration of criminal justice have changed more in the past six years than in all the prior history of this country. Beginning in 1961, with the decision of the Supreme Court in the case of *Mapp v. Ohio*, the Court has undertaken to impose—in the form of a series of constitutional rulings—a detailed code of criminal procedure on the states.

One of the arguments in favor of this trend is that it will force police officials and prosecutors to improve their techniques and procedures—to rely less on interrogations and confessions and more on tangible evidence. The inevitable result of the Supreme Court's rulings will be that police techniques will become more sophisticated, because the price of a procedural blunder is that the accused often goes free.

Just as this procedural upheaval has put new demands on judges, prosecutors, and police officers, so has it called for more perception and sophistication on the part of newsmen who cover courts and crime. For years the job of the police-and-court reporter changed very little. It did not have to change because for decades the rules of the game had remained essentially unchanged.

Since 1961 the rules have changed rapidly indeed, and more changes may soon be announced. One of the best continuing domestic stories of these times is the question of what

has occurred in various communities across the country in the wake of these vast legal developments.

In saying that the rules governing the administration of criminal justice have changed, I want to take care not to say that the administration of justice itself has changed. Very little is known so far about how much things actually have changed. Are local police really confining their search-and-seizure activity within the limitations of the Fourth Amendment, as required by the *Mapp* decision?

I don't know, but not long ago I was in San Francisco. I dropped in on the Municipal Court clerk to check up on the frequency of the use of search warrants. At first he couldn't even find the search warrant file, but finally he located it, and we discovered the following: In 1960, before *Mapp*, six search warrants were issued in the city of San Francisco. In 1966, six years after *Mapp*, nineteen were issued. San Francisco is a city of 750,000 people and 1,800 police officers. Is *Mapp* being observed? I do not know, but these figures provide food for thought.

With so many constitutional changes in such a short time, the questions raised are almost innumerable. Have narcotics and gambling convictions—which often depend upon searches —declined in number? Has the volume of police questioning really declined since *Escobedo v. Illinois* and *Miranda v. Arizona?* If so, have convictions become more difficult to obtain? Are fewer defendants pleading guilty, and are a higher percentage demanding trials? And if so, is the court system able to keep up with its docket? With the procedural rights of defendants making evidence more difficult to obtain, are juries reacting by lowering the level of evidence necessary to convict so that convictions result despite all of the changes? Or is the district attorney losing a larger percentage of his cases than he did in 1960?

There are many other questions to be asked and answered, and although the law professors and sociologists will get around to them in time, the brunt of the job will and should fall upon the press. This task—reporting the grass-roots im-

plementation (or non-implementation) of what the lawyers call the "due process revolution"—is surely the greatest responsibility that the news media have regarding the administration of justice.

Need for Press Specialists

So far, there have been signs that the fourth estate has not done as well as it should in reporting this story. One reason, I think, is that the classic organization of news coverage in this field may be outdated. Most newspapers have traditionally assigned certain reporters to cover the police beat and others to cover the courts. This made sense as long as the law considered the two (the investigative and judicial phases) to be distinct elements in the process of justice. But the Supreme Court has now held that a suspect's right to counsel and his privilege against self-incrimination attach prior to the trial—when he is being interrogated or identified in a line-up. And certainly future cases will extend these rights to other pretrial procedures.

My newspaper, the New York *Times*, has recently employed two specialists whose beats are neither the police nor the courts but both—and more. One is a lawyer and the other is a former staff member of the President's National Crime Commission. Their broad assignment permits them to cover the administration of criminal justice from the station house to the appellate courts to the law schools and to the criminology classrooms. One advantage is the added manpower. One of the reasons for our shortcomings in covering the due process revolution is that the size of the job has increased, while many newspapers have not put additional reporters on the job.

Beyond the adjustments in organization and manpower that should be made, we reporters must become more sophisticated in reporting the story of the due process revolution. I fear that the reporting of the aftermath of the *Miranda* decision has been inadequate and frequently misleading. Part of this has been due to the complexity of the decision itself,

but some of it was due to the willingness of the press to go for a sure, safe, simple headline story, when there were complexities to the situation that should have been explored in print.

The *Miranda* case, decided by the Supreme Court on June 13, 1966, held that the Fifth Amendment's privilege against compulsory self-incrimination prohibits the use in evidence of in-custody confessions unless certain safeguards were observed by the police. The suspect had to be given an elaborate warning of his right to counsel and to remain silent, before any questioning could be conducted. Admissions and confessions that were not preceeded by the *Miranda* warning were not admissible in evidence.

On the Monday after the *Miranda* decision, the Court announced that the new rule would apply only to confessions offered in evidence in trials held after June 13, 1966. In retrospect, this seems to have been a major blunder by the Court. The purpose, of course, was to avoid emptying the prisons of convicts who had been convicted with the use of confessions. But in drawing the line at trials held after June 13 and not at the use of confessions taken after that date, the Supreme Court created a "confessions gap" that quickly brought the Court under public criticism. Soon, cases began to come up for trial in which confessions, having been taken before the *Miranda* case was decided, and thus without the detailed *Miranda* warning, were ruled inadmissible in evidence.

The situation lent itself to sensational news stories. Murderers and rapists walked free, prosecutors and even judges gnashed their teeth publicly after the *Miranda* ruling. The impression was created that law enforcement was being confronted with a breakdown—a nervous breakdown, if not an actual one. What was not made clear in the press was that this was a temporary phenomenon that would pass as soon as the cases involving pre-*Miranda* confessions were disposed of.

Let me read a few headlines from clips in my file. "Bronx Man who Admitted Rape Set Free under Miranda Ruling;"

"Confessed Slayer of Wife and 5 Children Freed;" "Two Who Confessed Go Free in Slaying;" "Illegal Confession Frees Mother Here in Slaying of Boy, 4;" and "Miranda Rule Voided 72 Maryland Confessions." Some of these headlines are from the New York *Times* and I see nothing inherently wrong with them.

While most of the articles disclosed at some point that the confession involved had come at a peculiar time, I think too few stories were written to impress this on the readers. The result is that the indignation about these cases has been permitted to merge with an altogether different and far more significant question: Will the *Miranda* decision have a long-term destructive effect on law enforcement in this country.

Impact of Miranda

Despite the impression created by some cases, there is some persuasive evidence that the *Miranda* decision has had little or no adverse impact on the administration of justice. The best evidence comes from Washington, D.C., which is the only major city so far to establish an around-the-clock system of "situation-house lawyers" to serve poor suspects. The system, which was the brainchild of A. Kenneth Pye, makes available volunteer lawyers on a 24-hour basis. When a suspect is brought to the station house he is immediately given the *Miranda* warning and given a telephone number to call if he desires counsel. If he calls the number, an employee of the Washington legal services unit of the Office of Economic Opportunity will obtain a volunteer lawyer to advise the suspect. This system affords the best available check of the impact of *Miranda.*

In every other jurisdiction that I know about, the suspect is informed that a lawyer will be appointed to advise him before he is questioned. But he knows and the police know that in fact no lawyer is immediately available to advise a man who cannot pay. He may languish in jail for hours or days, waiting for the lawyer to appear, and this may encourage him to waive

his *Miranda* rights and to answer questions. In Washington the lawyer is available and free for the asking.

How many have requested counsel? Less than one of nine. A report issued in July, concerning the first six months' experience under the system, disclosed that of all persons arrested on felony or serious misdemeanor charges, only 7.3 percent made telephone requests for help from attorneys. There could be many reasons for this. A few might not have given the *Miranda* warning (eleven percent of those interviewed by lawyers claimed they had not been warned of their rights). More likely, the warnings might have been given in such a rote manner that the suspects didn't fully understand—or didn't dare to assert—their right to counsel. Of those who requested counsel, about one-half talked to the police before the lawyer arrived, and about a third of these gave incriminating statements. A number talked even after the lawyer warned them to stay mute. Regardless of the reasons, and laying aside for the moment the question of whether or not it is a good thing, the obvious implication is that *Miranda* has had little impact on the police's ability to question suspects in the District of Columbia.

Other studies have produced similar indications. The Legal Aid office in New York has estimated that only three of ten suspects there request a lawyer after being advised of their rights. Evelle Younger, district attorney of Los Angeles County, compared cases investigated before and after *Miranda*. He found that 50 percent of those who had been given the *Miranda* warning made either a confession or admission. A previous study had shown that 40 percent confessed after having been given a less explicit warning. Mr. Younger also concluded that confessions were necessary for a conviction in only 10 percent of the felony cases studied in his sample. Nathan R. Sobel, a justice of the Supreme Court of New York, concluded from a study of 1,000 indictments in his jurisdiction of Kings County that confessions figured in only 100, or 10 percent of the cases. In a later study of 2,000 cases in Kings County, he found that only 275 suspects had made

statements, and that 90 percent of these plead guilty without a contest. Twenty-two defendants who confessed challenged their confessions in court. Two succeeded in having their confessions thrown out. All of this is based on weak statistics and questionable assumptions.

The confusion is compounded by the claims of those on the other side of the fence that law enforcement has been gravely crippled by *Miranda*. District Attorney Frank Hogan of New York County, one of the most respected prosecutors in the United States, believes that *Miranda* has hurt law enforcement, and he disputes Judge Sobel's figures. In the year since *Miranda*, 30 percent of the 216 murder suspects in Manhattan refused to say anything to the police. Before *Miranda*, virtually all suspects talked, if only to deny their guilt, Mr. Hogan said.

New York police officials confirm these statements. The number of unsolved murders rose so rapidly in New York in 1967 that the police force formed a special study group to investigate the reasons. Frederick M. Lussen, chief of detectives, said he already knew why: "We're convinced," he said, "that court rulings emphasizing that those questioned by the police have a right to a lawyer while talking to us are responsible for our inability to solve more murders as quickly as we used to."

Perhaps the most perceptive analysis of the conflicting opinions was made by Justice Byron R. White, in a talk to the conference of Chief Justices. So far, he said, the studies about the impact of *Miranda* have all been produced "by those who are deeply committed to one view or the other and who omit or ignore aspects troublesome to their side of the case."

The Role of the Press

This is where the press should step in. Skilled in discovering facts, hopefully unprejudiced, it could discover, in a number of studies in communities across the country, whether the limitations on confessions really are damaging law en-

forcement—or really are protecting the rights of criminal suspects.

This kind of information is sorely needed, because it is possible that the nation is approaching the most serious constitutional crisis since the "Nine Old Men" knuckled under to the New Deal in 1937. The United States has by far the highest crime rate of any modern nation, yet at the same time, its laws appear to give accused criminals more protection against police activity than the laws of any other Western nation, with the possible exception of Scotland.

The reliability of crime statistics is certainly open to question, but the figures are so striking that, even allowing for distortions, the United States must be seen to be the most crime-ridden nation in the Western World. According to the latest F.B.I. figures, there were 1,656 serious crimes in 1966 for each 100,000 Americans. For each 100,000 of us, there were 5.9 murders, 15.5 rapes and 78.3 robberies. By comparison, the murder rate per 100,000 persons is .4 in England, .5 in Scotland and .8 in Germany. Thus the murder rate here is seven times that of Germany. Our 15.5 rape rate compares to 2 in Scotland and 10.6 in Germany. Our 78.3 robbery rate compares to 19.3 in Scotland and 12.4 in Germany.

As high as our crime rate is already, the experts assure us that it will go higher—regardless of court decisions. The factors that contribute to criminality—a youthful population, racial tensions, and urbanization—are increasing, so we can expect the crime picture to get worse before it gets better.

We have seen already that there is a strong tendency to blame the courts for this trend. Recent constitutional changes have made the criminal suspects' safeguards more extensive (on paper, at least) in the United States than in any other civilized country. Studies show that only Scotland has a system of warnings—enforced by an exclusionary rule— similar to *Miranda*. And with the more recently-announced right of suspects to have counsel present at police line-ups, plus the further likelihood that the Supreme Court will impose some limitations during its coming term on the "stop and frisk"

power of the police, I think it is safe to say that the United States has the highest crime rate and the strongest protections for the criminal suspect of any modern nation.

I am convinced that this situation will bring the United States to the brink of a constitutional crisis within the next few years. Already, critics of the *Miranda* decision are calling for a constitutional amendment to correct what they consider an imbalance in favor of the criminal suspect. Among these are some of the most thoughtful lawyers and judges in this country, including Chief Justice Roger Traynor of California, Justice Walter V. Schaefer of Illinois and Lewis F. Powell, former president of the American Bar Association.

The United States has not amended one of its Bill of Rights since they were added to the Constitution in 1790. I am not one of those who consider them Holy Writ, just because they were written down by men in knee-breeches. They have never been interpreted to mean as much as the present Supreme Court interprets them to mean, and some adjustments by way of Constitutional Amendment might well be in order.

That same Bill of Rights also represents some of the characteristics of the United States that make it the free and pleasant nation that it is. We should be sure that changes are needed before we tinker with the first ten amendments. Furthermore, if changes become necessary, they should be limited, intelligent changes. If they are made in an atmosphere of hysteria and blame-placing, they can be less than this.

Take, for instance, the recent proposal by the Attorney General of Iowa, Richard C. Turner, that the Fifth Amendment be amended to reverse the *Escobedo* and *Miranda* decisions. His proposed amendment would permit the police to ". . . obtain confessions and statements from them (defendants and witnesses) 1. whether voluntary or involuntary 2. by trickery or otherwise, so long as no coercion or compulsion is used." It takes little thought on this self-contradictory, almost incoherent statement to be persuaded that it has no

place in the Constitution of the United States.

I suggest that the most crucial task of the press in covering domestic events in the coming decade will be to explore the relationship between crime and the courts. Each of us should discover whether the Supreme Court's rulings are actually handicapping proper law enforcement in our community. We should also find out if suspects are being granted the constitutional protections they are supposed to have. Then we should cast a very critical eye, I think, on proposed measures to reduce the individual safeguards announced by the Courts. If we present an accurate picture of the actual administration of criminal justice on the local level, and also of the proposed constitutional changes in that system, we may be able to preserve the benefits of the due process revolution and avoid an unpleasant period of lawlessness at the same time.

FUTURE TRENDS

Wayne R. LaFave

Certain changes are essential to a fair, effective, and efficient criminal justice system. Since an analysis of all possible or predicted changes is not practicable, let me concentrate attention on four developments that I want to discuss with you. While I shall state each of them in broad, rather general terms, I shall attempt to supply rather specific illustrations of each of them.

Now, what are they?

Development Number One: A more careful and complete analysis of the amount and kind of evidence which should be required to justify the several critical decisions which are made in the criminal justice process.

One helpful way of looking at the entire system for the administration of criminal justice is to view it as a series of critical decisions—critical to both the individual concerned and to society as a whole. Taken in their usual chronological order, the key decisions are whether and how to conduct an investigation, whether to arrest, whether to charge, whether to convict, what sentence to impose, and, finally, various decisions in the field of corrections. Although this is an oversimplification, at least many of these decisions, when so ordered, result in what might be called a step profile of the criminal justice system; each succeeding decision requires a higher degree of evidence than the immediately preceding decision. In

short, as the consequences to the individual being dealt with become more serious, the official decision-makers must have a greater quantum of evidence. The high point in this profile is conviction, for it requires evidence which establishes guilt beyond a reasonable doubt, which is clearly a much more demanding test than, say, the probable cause which the police must have to justify an arrest.

Now, one major difficulty with the current system, as I see it, is that there has not been sufficient concern with the question of precisely what shape this evidentiary profile ought to have. The profile remains fuzzy at best, and one cannot say with certainty exactly how many steps there are in it or precisely how high many of the steps are. I would like to illustrate this problem with examples drawn primarily from the realm of police decision-making; this is perhaps the most critical area because the consequences of uncertainty—the frequent exclusion of evidence—are most serious.

Our starting point here must be the Fourth Amendment, which bars unreasonable searches and seizures and requires that warrants issue only upon probable cause. Although a literal reading of the amendment does not compel this conclusion, it has been traditional for courts to say that the police may not have more power without a warrant than with a warrant, and thus a certain quantum of evidence, called "probable cause," is needed to make either an arrest or a search, whether it be with or without a warrant. Important for our purposes is the fact that it has long been assumed that essentially the same amount of evidence is needed whether the objective is search or arrest; appellate decisions on the grounds needed to arrest typically refer to and rely upon prior decisions dealing with the grounds for search, just as the search cases resort to precedents on the subject of arrest.

It seems to me that there is good reason to question the wisdom of this approach. The point was made very well a few years ago by Dean Edward Barrett of California in an excellent article entitled "Personal Rights, Property Rights, and the Fourth Amendment." He observed that a police decision

to arrest is a significant invasion of personal liberty even if the individual's innocence is ultimately established, as the person is subjected to the indignity of being taken into custody, is fingerprinted and photographed and detained until he obtains his release on bail, and even if promptly released he will have acquired an arrest record which may haunt him for the rest of his life. By comparison, the consequences of a search are relatively minor. In terms of the practical consequences, the damage suffered is primarily to property interests and is not significantly different from the damage resulting from other illegal entries onto private property. The search will result in a deprivation of personal liberty only as to the guilty, in the sense that it will uncover the fruits of crime which may be used to convict. This being so, Barrett argues, why should essentially the same standards govern arrest and search? "Would not the policy of the Fourth Amendment be better served," he asks, "by an approach which determines the reasonableness of each investigative technique by balancing the seriousness of the suspected crime and the degree of reasonable suspicion possessed by the police against the magnitude of the invasion of the personal security and property rights of the individual involved?" In short, since the protection of personal liberty is more important than the protection of property interests, why should the rules for arrest and search be the same? I hasten to add that the result of developing different rules would not necessarily be greater freedom to search; it might instead be more restrictions on arrest. As Barrett makes clear, one unfortunate consequence of the single standard approach has been a tendency to water-down the grounds for arrest so as to justify the search which are made incident thereto.

Another illustration of essentially the same problem concerns a common police practice referred to as stopping and questioning, field interrogation, or, sometimes, stop-and-frisk. The practice involves a momentary stopping of a suspicious person by the police so that he may be questioned about what he is up to, and, when the circumstances require, may

be accompanied by a frisk—that is, a "patting down"—for weapons so that the inquiring officer is not subjected to undue danger. In a few jurisdictions, most notably New York, the practice is expressly authorized by statute on grounds slightly short of that which would be required for arrest. In most other states, the policeman's authority in this regard is clouded with doubt, as reflected by the recommendation of the President's Commission on Law Enforcement and Administration of Justice that "state legislatures should enact statutory provisions with respect to the authority of law enforcement officers to stop persons for brief questioning, including specifications of the circumstances and limitations under which stops are "permissible."

But, what would be the fate of such statutes? There are many who claim that the New York stop-and-frisk law, or, indeed, any such law, violates the Fourth Amendment, and they reach this result by adopting the single standard approach to probable cause. Their argument, in brief, is this: Any interference with a person is an arrest, and any seeking of that which is not open to view is a search, and thus a stopping for questioning is unconstitutional, absent grounds to arrest the suspect and take him to the station, and a frisk of that person is unconstitutional, absent grounds for a full-fledged search. I do not find this kind of analysis convincing, as it seems to me that if questioning and frisking are to be found unconstitutional, this result should not be reached on the unwarranted assumption that these practices are indistinguishable from arrest and search. It seems to me that the stopping, as contrasted with an arrest, is relatively short, less conspicuous, less humiliating to the person, and offers much less chance for police coercion, and thus should be permitted on grounds slightly short of that needed for arrest. Likewise, a frisk is less of an invasion than a full search of the person, and it ought to be distinguishable on pragmatic grounds from the degree of constitutional protection which surrounds a full-blown search of the person.

I find a ray of hope in some of the language used by the

Supreme Court in the case of *Camara v. Municipal Court.* That case was not in the realm of criminal procedure at all, for it involved the question of whether health inspections of premises are permissible only when there is probable cause—as that phrase has traditionally been interpreted—to believe that a code violation exists in the premises. The Court answered in the negative, and observed that "there can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." To the best of my knowledge, this is the first occasion upon which the Court has acknowledged that the probable cause required by the Fourth Amendment is not a fixed test, but instead involves a sort of calculus incorporating all the surrounding circumstances of the intended action. Should the Court adopt this same balancing approach in cases involving police activities, the result may be a more careful and realistic appraisal of the amount of evidence needed for several distinct kinds of police action.

Need for Careful, Complete Analysis

Before leaving this subject, I should take a moment to say that the broadly-stated concern I started with—a need for more careful and complete analysis of the amount and kind of evidence needed to justify critical decisions—is by no means limited to police decisions. A few brief examples will indicate some of the current problems in this area:

(1) Precisely how much evidence should a prosecutor be required to have before he charges an individual with a crime and thereby forces that person to stand trial? Just to confuse things further, let me say that the law has always been that the prosecutor must be prepared to show "probable cause." But, is this the same probable cause as is needed for arrest, or is it something different? This is obviously a question of some importance. For one thing, whether the standards are identical or different is bound to affect one's view of whether post-arrest, in-custody investigation of a suspect should be permitted. For another, it bears upon the issue of what evi-

dence the prosecutor must furnish at the preliminary hearing, for if the case at that stage is to be tested in the same way as an arrest, then it is clear that hearsay and various other kinds of inadmissible evidence might be put forward. There currently exists considerable confusion on this point in both the federal system and several states, but there is beginning to develop a notion that the charging decision should require a greater amount of evidence than arrest and that the rules of evidence which prevail at trial are to be considered in determining the sufficiency of the prosecutor's evidence. This, I might add, is a most appropriate development, as if the question is whether there is sufficient evidence to justify the prosecutor in trying for a conviction, then it obviously makes sense to be concerned about the probability of conviction, which in turn depends upon the evidence against the defendant which may actually be admitted against him at trial.

(2) Precisely how much evidence should be required for a conviction without trial? I emphasize without trial, as the law is quite clear that upon trial the defendant must be proved guilty beyond a reasonable doubt, and a host of cases in every jurisdiction have given a very definite meaning to the reasonable doubt standard. But, conviction without trial occurs in the overwhelming majority of cases—probably around 85 percent—in which the defendant enters a plea of guilty. While the traditional approach has been to permit such conviction merely upon the defendant's acknowledgment of guilt, there has most recently developed a concern with the adequacy of this procedure. It appears that in a small but significant number of cases, defendants have entered guilty pleas to offenses they did not commit. For this reason, the federal rules of criminal procedure were recently amended to provide that "the court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea." And a few months ago, one of the advisory committees of the American Bar Association Project on Minimum Standards for Criminal Justice proposed that this become the law in all jurisdictions.

(3) Precisely how much evidence should be required for a revocation of probation? For example, assume that a person has been convicted of offense A and placed upon probation by the trial judge, but some months later that person is brought in on the claim that he has recently committed offense B. What commonly happens, which is permitted under the law of most jurisdictions, is that this second charge is tried informally by the probation court upon the revocation issue, and thus all that is needed is some evidence tending to show the new crime. There is reason to question whether revocation upon such limited proof of another criminal offense should be permitted, and whether the better approach is not to permit revocation only upon conviction for the second crime, where it would have to be established beyond a reasonable doubt. This is the English system, and has been proposed for this country by the draftsmen of the Model Penal Code.

Development Number Two: A more careful and complete delineation of criteria to serve as the basis for the exercise of discretion at the several critical decision levels on the question of whether the individual should be subjected to the subsequent steps of the criminal justice system.

I noted earlier that one way of viewing the entire criminal justice system is as a series of decisions, generally requiring increasing amounts of evidence of criminal misconduct in order to move the prospective or actual defendant farther along in the process. It is clear, however, that police, prosecutors, judges, and other administrators of the process do not concern themselves solely with the probability of guilt issue. Equally relevant at all levels of the process, in terms of actual practice, is the question of whether, even if the evidence is sufficient to do so, it is wise to subject the individual concerned to the balance of the process. In short, police, prosecutors, judges, and correctional personnel exercise a broad range of discretion in deciding in individual cases whether to invoke the total criminal process against an apparently guilty person. The police consciously choose not to arrest some per-

sons they could arrest, prosecutors deliberately avoid charging some people they could charge, and so on. While the law has long recognized that the prosecutor is vested with such discretion, the situation is unclear as to certain other officials, such as the police, and it may be said that generally there have not been developed criteria or procedures to ensure that the exercise of this discretion will occur on a sound, rational, and consistent basis.

Limiting our discussion for the moment to the police, it may be said at the outset that empirical research for the American Bar Foundation Survey of the Administration of Criminal Justice established beyond question that the police in this country exercise vast and largely uncontrolled discretion in deciding whether individuals, against whom there exists probable cause, are to be arrested and thereby channeled into the criminal justice system. This police discretion, it should be added, occurs on a haphazard basis without any serious attempt by police administrators to set guidelines for its exercise or, indeed, even to acknowledge its existence. Perhaps this is merely a consequence of the failure of the law, either through decided appellate cases or through legislative enactment, to deal with the problem. Thus the practice of unlimited discretion continues without any accountability and without any effort from the law itself to define the nature of the discretion which exists, to indicate who should bear responsibility for its exercise, or to furnish norms to guide and control the discretion thus exercised.

This is clearly an unfortunate situation, and one which hopefully will be remedied in the years ahead. In short, the need is to implement one of the key recommendations of the President's commission, as follows: "Police departments should develop and ennunciate policies that give police personnel specific guidance for the common situations requiring the exercise of police discretion. Policies should cover such matters, among others, as the issuance of orders to citizens regarding their movements or activities, the handling of minor disputes, . . . the selection and use of investigative methods,

and the decision whether or not to arrest in specific situations involving specific crimes."

It is important, I think, to note that the President's commission emphasized its strong belief that, "It is not only appropriate, but necessary, for policemen to exercise discretion about arrests." But, I would underscore the commission's caveat: "It is both inappropriate and unnecessary for the entire burden of exercising this discretion to be placed on individual policemen in tumultuous situations. It is incumbent on police departments to define as precisely as possible when arrest is a proper action and when it is not."

What are some of the potential benefits of police policy-making? As pointed out by the President's Commission, "it would bring the important street decisions, now made only by patrolmen, up to the level of the chief administrator and his staff, who would formulate policy much in the way a board of directors serves a corporation. This would remove from individual policemen some of the burden of having to make important decisions *ad hoc*, in a matter of seconds. It would create a body of standards that would help make the supervision and evaluation of the work of individual policemen consistent. It would help courts understand the issues at stake when police procedures are challenged and lessen the likelihood of inappropriate judicial restrictions being placed on police work. Police administrators then would have more freedom to meet the changing needs of law enforcement."

Some Areas of Concern

While perhaps the problem is most dramatic at the police level, I would emphasize the need to establish bases for the exercise of sound discretion is by no means so limited. To fill out the picture somewhat, let me state briefly some other areas of concern:

(1) The prosecutor's discretionary determination of whether to prosecute. The problem here is more manageable, first, because the law is clear that the prosecutor possesses such discretion, and, secondly, because the decision-making is rela-

tively centralized. In a given locality, there may be thousands of police exercising discretion as to whether to arrest, but there will only be a handful of persons on the prosecutor's staff with the responsibility for screening cases at that level. Yet, it is clear that in most prosecutors' offices insufficient attention has been given to this important aspect of the district attorney's job. The need was well stated by the President's commission: "Prosecutors should endeavor to make discriminating charge decisions, assuring that offenders who merit criminal sanctions are not released and that other offenders are either released or diverted to noncriminal methods of treatment and control by: Establishment of explicit policies for the dismissal or informal disposition of the cases of certain marginal offenders. [and] Early identification and diversion to other community resources of those offenders in need of treatment, for whom full criminal disposition does not appear required."

(2) The judge's discretionary determination of whether to convict. It should be noted, first of all, that such discretion is clearly exercised by the jury in cases tried by the jury. Inherent in the jury system is the power juries possess to come in with a verdict of not guilty in the face of conclusive evidence of guilt. The research of the Chicago Jury Project, reflected in the book *The American Jury*, by Professors Harry Kalven, Jr. and Hans Ziesel, shows that such discretion is frequently exercised by the jury, and, I think, also reflects that juries generally do so for good reasons. But, what of the many instances in which the case is tried by the judge? Should the judge likewise exercise such discretion, and, if so, on what basis? There are probably many judges who would deny that they do exercise such discretion, but the research of the AFB Survey of the Administration of Criminal Justice clearly establishes that trial judges do acquit obviously guilty defendants in an effort to individualize justice, to introduce an element of equity into what would otherwise be a quasi-automatic unfelling process. I think it is desirable that this be done, but again there is a need to establish sound criteria to

guide such decision-making. Some efforts in this direction are being made, as exemplified by the Model Penal Code provision which would permit the judge to avoid conviction for what are characterized as "*de minimus* infractions" under certain defined circumstances.

(3) The determination by correctional personnel of whether a convicted offender should be shifted from the institution to the community. I should say, first of all, that our discussion of discretion in the criminal justice process would be incomplete without some reference to the field of corrections, for it is here that discretion is frequently exercised and strongly defended by those in correctional work. They stress the high degree of professionalism in correctional work, and they thus assert the need to maintain the authority to utilize their expert knowledge in the exercise of broad discretion without the inhibiting effect of legal rules. But, one may acknowledge both the need for discretion and the expertise and yet recognize the necessity of establishing criteria for the making of these critical decisions. As Professor Herbert Wechsler has said on this point, "I certainly cannot agree or cannot have the slightest respect for decisions by anybody for which no reason can be given, and I would submit . . . that utterly undisciplined parole adjudications—that is, adjudications without reference to a norm—do no represent sound parole practice." The President's Commission, it should be noted, has recommended that correctional agencies develop explicit standards for this decision-making.

Development Number Three: A careful reexamination of difficult problems currently dealt with in the criminal justice system by resort to informal processes, or accommodations, whereby only a part of the criminal justice system is invoked.

So far, we have discussed two kinds of decision-making which are found at almost all stages of our systems for the administration of criminal justice: one is a sufficiency-of-the-evidence decision, which requires a determination of whether

there is enough factual evidence to justify moving the individual on to the next stage; the other is the discretionary-invocation decision, which requires a determination of whether there are policy grounds for not having the individual subjected to the criminal process. We now confront another kind of decision which is likewise an important part of current practice—the decision to resort to some informal accommodation whereby only a part of the criminal process is invoked. These accommodations often result from frustrations of the administrators in attempting to deal with serious problems within the existing framework, and are typically resorted to because it is thought that the desired objectives may be achieved by subjecting the individual to only a part of the process, that the cost of invoking the full process would be excessive in view of the minimal additional achievements, or that use of the total process is not possible even if desirable because of limited personnel and facilities. The fact that these informal alternatives are resorted to so frequently raises serious questions about whether the criminal justice system has been assigned tasks inappropriate to it and also whether some change in the existing framework is necessary to best achieve those tasks which must be dealt with by the criminal process. This will become apparent, I believe, if we look at two specific examples of this phenomenon.

Because one of these examples has to do with arrest, we should note initially that it is commonly assumed that the making of an arrest is a practice which may be justified for but one reason, namely, the bringing of the suspected offender in as a prelude to prosecution. Indeed, in many jurisdictions arrest is defined by statute as "the taking of a person into custody so that he may be held to answer for a public offense." But one accommodation to be found in the system currently is that the police often make arrests for purposes other than prosecution.

Consider, for example, the practice with regard to the offense of public drunkenness. Although a substantial number of those persons found intoxicated in public areas are not

arrested, it is routine practice to take custody of those drunks who might be harmed if not incarcerated. Typically the subject of such an arrest is a habitue of skid row who must be arrested for his own safety because he has fallen and injured himself, because he needs protection from the cold, or because he is likely to become the victim of a jackroller. The true purpose of these arrests is reflected in different ways in cities across the country; in some places the officer will enter "drunk-safekeeping" on the arrest report elsewhere he will make a notation that the man was arrested "for his own protection," while in some localities the revealing term "golden rule drunk" is used to describe the person so dealt with. The purpose of these arrests is also reflected by the subsequent disposition of those who are arrested; few ever reach court, most are released by the police the following day when they sober up.

It is apparent that, although public drunkenness has been labeled a crime and although the police have had to assume the responsibility for these unfortunates, there is no basis for concluding that the chronic drunk is a proper object of penal sanctions. Indeed, a few courts have recently said as much, holding that conviction for public intoxication of one addicted to alcohol constitutes cruel and unusual punishment. It is also obvious that by leaving this distressing problem, by default, to the police, no real progress is made toward its ultimate resolution. Although there are short-term gains from the overnight incarceration of the down-and-out drunk, no one can contend seriously that putting the habitual drunk and alcohol addict through what has aptly been called the "revolving door" constitutes an effective solution.

The practice I have described is merely one illustration of the consequences which follow from the fact that we have long relied upon our criminal justice system for the administration of what are essentially social services. As Dean Frank Allen of Michigan has aptly put it, "The system of criminal justice may be viewed as a weary Atlas upon whose shoulders we have heaped a crushing burden or responsibilities

relating to public policy in its various aspects." Given this fact, one can hardly be critical of the police for adapting their procedures and doing what seems best under the circumstances, even though the practice I have described is not authorized by law. Yet, we cannot afford merely to continue these practices. Not only do they fail to meet the underlying medical and social problems involved, but they divert substantial amounts of police resources away from vital tasks which only the criminal process can perform, as about one-third of all arrests made by the police are for drunkenness. Thus, here is one informal accommodation of the criminal justice system which must give way to more effective procedures. The President's commission, I might add, has provided a helpful blueprint for fruitful lines of action.

Settlement by Negotiation

The second kind of informal accommodation which I want to discuss with you goes by many names; it is referred to as "plea negotiation," "plea bargaining," "trading out," or "the compromise of criminal cases," and it is a pervasive practice in current criminal justice administration. The overwhelming majority of criminal cases are disposed of by pleas of guilty, and a substantial number of these pleas are the result of prior dealings between the prosecutor and the defendant or his attorney. A wide range of promises is made by prosecutors in exchange for pleas of guilty; included are promises to reduce charges, to dismiss charges, not to charge other offenses, or to seek or obtain a certain sentence. As Thurman Arnold once observed, the ideal of law enforcement compels the necessary compromises in criminal cases to be carried on *sub rosa* while the process is openly condemned. Thus, prosecutors and defense counsel are reluctant to discuss openly the plea negotiation process, and at the more formal part of the pleading process—the in-court appearance at which the defendant enters his plea—the parties typically act as if no prior negotiations have occurred. It is routine for the judge to ask the defendant if any promises were made to him, and

it is routine for the defendant, properly coached, to reply in the negative. Yet the defendant's plea was motivated primarily by the prior negotiations at which the prosecutor indicated to the defendant and his counsel, in quite specific terms, what could be gained by entry of a guilty plea.

Now, just about everyone agrees that this state of affairs ought not to continue. But, there is no agreement as to whether bargaining for pleas should be absolutely prohibited or whether instead a more realistic avenue of reform lies in elevating this informal, unregulated, and generally invisible practice to a level where it is formally sanctioned by the law and is subject to some control. I happen to hold to the latter view, which, happily, is also the position taken by the President's commission and by an advisory committee of the A.B.A. Project on Minimum Standards for Criminal Justice.

The commission and the A.B.A. committee, after a careful analysis of the bargaining process, reached the conclusion that conviction without trial should continue to be a frequent means for the disposition of criminal cases, in that a number of values are served by such disposition. By his plea, the defendant aids in ensuring the prompt and certain application of correctional measures to him. He also aids in avoiding delay in the disposition of other cases, thereby increasing the probability of prompt and certain application of correctional measures to other offenders. In addition, the plea provides a means by which the defendant may acknowledge his guilt and manifest a willingness to assume responsibility for his conduct. Also, in some cases the plea makes it possible to avoid a public trial when the consequences of such publicity outweigh any legitimate need for a public trial. Pleas to lesser offenses make possible alternative correctional measures better adapted to achieving the purposes of correctional treatment, and often prevent undue harm to the defendant from the form of conviction. Such pleas also make it possible to grant concessions to a defendant who has given or offered cooperation in the prosecution of other offenders.

Conviction on a plea of guilty, then, is not merely a matter

of administrative convenience. Even if more prosecutors, judges, and defense counsel were available and trial of all cases was possible, conviction without trial would continue to be a necessary and proper part of the administration of criminal justice. It may be noted, however, that a high proportion of pleas of guilty does benefit the system. Such pleas tend to limit the trial process to deciding real disputes, and, consequently, to reduce the need for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilt aids in preserving the meaningfulness of the presumption of innocense.

The conclusion, therefore, is that because the frequency of conviction without trial not only permits the achievement of legitimate objectives in cases where pleas of guilty are entered, but also enhances the quality of justice in other cases, reform lies not in bringing a substantial shift away from the practice whereby trial-avoiding pleas are obtained, but rather by the formulation of procedures which will maximize the benefits of conviction without trial and minimize the risks of unfair or inaccurate results. This is what the proposed minimum standards for criminal justice on the subject of guilty pleas attempt to do. The standards recognize the propriety of plea agreements under certain defined circumstances, and thus would allow the prosecutor to agree with the defendant, only through his attorney, to seek or not oppose certain sentence or charge concessions if the defendant enters a plea of guilty. This involves certain responsibilities on the part of defense counsel, and these are identified. The standards also expressly provide that the trial judge is not to participate in these discussions, although they would permit a limited opportunity for advance consultation with the judge upon request of the parties. To ensure freedom in exploring the possibilities for

a plea agreement, it is provided that the fact the defendant engaged in such discussions or made an agreement is not admissible in evidence if the defendant thereafter decides to go to trial. To give increased visibility to the negotiation process, the standards would require that at the time the defendant's plea is received the prosecutor and defense counsel must state in court for the record precisely what agreement was reached. The judge would caution the defendant that the agreement is not binding upon him and that he need not follow the recommendations of the prosecutor if the information subsequently disclosed in a presentence report does not support such action. Finally, the standards set forth in some detail the considerations which the trial judge should take into account in deciding whether to grant charge or sentence concessions. These same considerations, it should be added, are intended to guide the prosecutor in deciding whether to enter a plea agreement. Hopefully, the years ahead will see the acceptance of these or similar proposals so that the presently informal guilty plea negotiation process may become an accepted, visible, controlled part of criminal justice administration.

Development Number Four: Increased efforts to establish effective checks upon decision-making at all levels of the criminal justice process.

There is a need to improve the quality of decision-making at all levels of our system for the administration of criminal justice. One way in which this can be done, of course, is through increased efforts to ensure that those officials charged with making these decisions have the necessary qualifications, training, and experience for the performance of their duties. Several of the recommendations of the President's Commission are addressed to this need. The commission, for example, recommends that the ultimate aim of all police departments should be that all personnel with general enforcement powers have baccalaureate degrees; that the states and the federal government should enact legislation to abolish or

overhaul the justice of the peace and U.S. commissioner system, particularly to require that these positions be staffed with persons fully trained in the law; that the systems for the selection of judges be improved through better screening; and that parole boards should be appointed to serve full time and solely on the basis of competence. In the absence of these improvements, or, indeed, even with them, there remains the need for a system of effective checks upon decision-making by all of these officials.

Certainly one effective way of providing a check upon most official decision-making is through the legal representative of the individual affected by the decision, and this usually is accomplished when that individual can afford to retain counsel to represent him through all stages of the proceedings. Even here, however, there are sometimes barriers to effective representation. For example, defense counsel often do not serve as an effective check upon the sentencing decision, the reason being that it is typically within the discretion of the trial judge whether counsel may gain access to the presentence report upon which the judge's decision is to be based. One needed change, as recommended by the President's Commission, is that in the absence of compelling reasons for nondisclosure of special information, the defendant and his counsel should be permitted to examine the entire presentence report.

But, a more serious problem lies in the absence of such legal representation at all stages when the defendant is indigent, which is the case as to well over half of all felony defendants. True, *Gideon v. Wainwright* established a constitutional right to counsel for all such defendants at trial. But, this only means that counsel must be provided at trial and that appointment must come sufficiently in advance of trial to permit preparation. A right to counsel at other points in the process depends upon whether it is a "critical stage," and as yet that term has been rather narrowly construed. For example, a preliminary hearing is a critical stage only under rather unusual circumstances, such as where the defendant

must assert or else waive certain defenses at that time. Thus, as a practical matter in most cases defense counsel serves as a check at trial, but not as to important decisions which are made before or after trial.

One need, again stated by the President's Commission, is regularly to involve defense counsel in the charging decision of the prosecutor. At the initial stages of the process when the prosecutor must decide whether to make a formal charge, defense counsel in acting to achieve a desirable outcome for his client may aid the state in evaluating its case. Without the intervention of counsel the prosecutor must reach his decision unilaterally or on the basis of such ordinarily unilluminating argument as the defendant himself can offer. Also, were the defendant to have counsel at the preliminary hearing, then there could be a realistic testing of the prosecutor's grounds for subjecting the defendant to trial, which often is not the case now.

Similarly, there is a need to provide counsel at certain post-trial proceedings, such as probation and parole revocation hearings. As the President's Commission observed, these hearings may involve both disputed issues of fact and difficult questions of judicial or administrative judgment. While these hearings lack some of the evidentiary and other technical complexities of trials, where the facts are disputed the same process of investigating, marshaling, and exhibiting facts is often demanded as at trial. A lawyer for the defense is needed in these proceedings because of the range of facts which will support revocation, the breadth of discretion in the court or agency to refuse revocation even through a violation of the conditions of release is found, and the absence of other procedural safeguards which surround the trial of guilt.

Perhaps one of the most perplexing problems in this area of providing effective checks upon decision-making is that of how to provide some check upon the decision of guilt or innocence reached by the jury. Jury deliberations, of course, take place in private, and we could hardly have it any other way. The law has long sought to protect this privacy, as illustrated

by the rule prevailing in most jurisdictions that jurors may not impeach their verdicts. That is, after the defendant has been convicted, that conviction may not be upset through receipt of an affidavit or testimony from a juror to the effect that something improper and prejudicial to the defendant occurred during the course of the deliberations. Here again, however, we may be on the threshold of a rather dramatic change in the law. In *Parker v. Gladden*, the United States Supreme Court found a defendant's conviction constitutionally invalid on the basis of jurors' testimony of prejudicial comments to the jurors by a bailiff. This evidence became a part of the record on review, apparently because the case came from a jurisdiction which does not adhere to the prevailing strict rule against impeachment. However, some other courts have now read *Parker* as requiring the impeachment rule to give way when there are allegations that the defendant's constitutional right to confrontation was violated. For example, on this basis the New York Court of Appeals, just a few weeks ago, held that jurors' affidavits must be received with regard to an unauthorized visit to the crime scene. Said the Court, "where the supreme Court holds that a particular series of events, when proven, violates a defendant's constitutional rights, implicit in that determination is the right of the defendant to prove facts substantiating his claim."

System of Internal Checks

Of course, the presence and participation of defense counsel is not the only kind of check which is needed. This is particularly true as to decisions made early in the process, such as to arrest or to search, for events have not developed to a point where defense counsel could enter the picture. There is therefore also a need for a system of internal checks, and while many such checks are built into the existing system, they do not always operate with maximum effectiveness.

For example, it is commonly said that the process of obtaining arrest and search warrants from a judicial officer constitutes an important check upon police action. The judicial

officer is to be preferred over the police officer, the Supreme Court has said, because resort to the warrant process "interposes an orderly procedure" involving "judicial impartiality" whereby "a neutral and detached magistrate" can make "informed and deliberate determinations" on the issue of probable cause. To leave such decisions to the police is to allow "hurried actions" by those "engaged in the often competitive enterprise of ferreting out crime." The exclusionary rule, it is said, is not sufficient; it is important that a disinterested observer should pass on the case before a deprivation of personal liberty occurs."

However, careful examination of current practices, such as that in the supporting empirical data of the ABF Survey of Administration of Criminal Justice in the United States, presents a somewhat different picture. In large urban areas particularly, arrest warrants are commonly issued without any meaningful participation by a judicial officer. If the judge signs the warrant, as is usually required by law, he may do so without a careful reading of the complaint and without any direct examination of the complaint. Although most judges view the issuance of a search warrant as an important responsibility, this is not true in all cases. There is, for example, evidence that some judges issue search warrants without giving detailed consideration to whether sufficient grounds exist. Serious consideration of the legality of the search is postponed until the issue is raised by a motion to suppress the evidence on the ground that it was illegally obtained.

Clearly, if maximum judicial participation in the making of law enforcement decisions is desirable, new ways must be developed to ensure that it is meaningful. For one thing, steps must be taken to ensure the availability of sufficient judicial manpower to perform these tasks. A part of the current problem is that judges are often called upon to issue warrants while involved in trying cases or performing other judicial duties. In addition, ways must be devised to overcome the present disinterest of judges in performing these kinds of tasks.

Conclusion

These, then, are four developments which, in my judgment, are fundamental to a more fair, efficient, effective, and enlightened criminal justice system. As I stated at the outset, I have only expressed my hopes for the future, and to state these as actual future trends may in some respects be overly optimistic. It is worth noting, however, that many of the problems I have discussed recently have received and currently are receiving sustained critical attention from influential organizations and groups, such as the President's Commission on Law Enforcement and Administration of Justice and the American Bar Association's Project on Minimum Standards for Criminal Justice. These groups, of course, cannot implement their own proposals. Concentrated efforts on the part of the organized bar and, indeed, from all interested and concerned citizens, hopefully stimulated by the press, will be necessary for their implementation.

BIOGRAPHICAL SKETCHES OF CONTRIBUTORS

HERMAN GOLDSTEIN

Herman Goldstein has the distinction of being a non-lawyer teaching in a university law school. He is an associate professor of criminal justice administration in the University of Wisconsin Law School, where he has taught since 1964. Prior to that, he was executive assistant to the superintendent of police in Chicago (1960-1964). Goldstein's background equips him for teaching, writing and research in criminal law and administration. He was administrative assistant to the city manager of Portland, Maine (1954-1956); research associate in municipal and state police functions for the survey of the administration of criminal justice conducted by the Ford Foundation-American Bar Foundation (1956-1957); assistant director of the Governmental Research Institute at Hartford, Connecticut (1957-1958); and a staff member of the Public Administration Service, a non-profit organization providing consulting services to local and state governments (1958-1960). He (with Frank J. Remington) wrote the part of Chapter 2 on "Law Enforcement Policy: The Police Role" (April, 1967) of the *Task Force Report: The Police* for the President's Commission on Law Enforcement and Administration of Justice. His other publications include a number of articles on police and their relationship to law and society. He received his B.A. degree from the University of Connecti-

cut (1953) and his M.G.A. degree from the Graduate Division of Governmental Administration of the Wharton School, University of Pennsylvania (1955).

JEROME H. SKOLNICK

Jerome H. Skolnick is a law-oriented sociologist who is now associate professor of sociology and research sociologist at the Center for the Study of Criminal Justice of the University of Chicago Law School. Prior to that he was associate research sociologist and lecturer on sociology at the Center for the Study of Law and Society of the University of California at Berkeley. His earlier titles were shorter but no less impressive. He began his occupational history as research associate to an assistant professor in law and sociology at Yale University (1956-1962); he become visiting assistant professor and assistant professor of sociology and assistant research sociologist at the University of California at Berkeley (1962); then went on to be a Carnegie fellow at Harvard Law School (1965-66) and visiting associate professor at the New York University School of Law (summer, 1966). The range of his teaching merits mention. At Yale, he taught behavioral science and law courses, family law and advanced torts, criminal law, and criminal procedure. At New York University Law School, he taught a course in sociology of law. At Berkeley, he taught graduate and undergraduate courses in deviance and social control and sociology of law and undergraduate courses in social problems, collective behavior and introductory sociology. He is the author of three books: *Problems of the Family* (with Fowler V. Harper), Bobbs-Merrill, 1962; *Justice Without Trial: Law Enforcement in Democratic Society*, New York: John Wiley and Sons, 1966; and *Society and the Legal Order: A Reader in Sociology of Law* (with R. D. Schwartz) Basic Books, 1967. He also has had published numerous articles and book reviews. He received his B.A. degree in economics, *cum laude*, from the City College of New York (1952); and his M.A. and Ph.D. degrees in sociology from Yale, respectively, in 1953 and 1957.

Ronald L. Goldfarb

Ronald L. Goldfarb is an attorney, an author, and an administrator in criminal justice. He is a partner in the law firm of Kurzman and Goldfarb, in Washington, D.C.; the director of the Brookings Institution program on the courts and administration of justice; and the author (with Alfred Friendly) of the book on free press and fair trial: *Crime and Publicity —The Influence of the Press on the Administration of Justice*. During 1965-1966 he was research director for the Twentieth Century Fund. *Crime and Publicity* was one of two books he wrote during this time. The other, *Ransom: A Critique of the American Bail System*, actually was written first under a grant from the Walter Meyer Foundation. That year he also worked as a consultant to the United States Senate Subcommittee on Improvements in Judicial Machinery (the Tydings subcommittee); conducted a private law practice, including Supreme Court advocacy; and served as consultant to NBC for a television documentary entitled "Checkbook Justice." Prior to that he was special prosecutor for the Department of Justice in the Organized Crime and Racketeering Section (1961-1965), conducting broad-scale investigations of nationwide criminal activities. From February through June, 1964, he worked as a member of the President's Task Force for the War Against Poverty on special assignment in the Department of Justice. From September through November of the same year, he was a speech writer on Robert F. Kennedy's Senatorial election staff. In addition to his three books, Goldfarb has written numerous articles for law reviews and general publications. He was president of his class at both Syracuse University (LL.B. 1956) and Yale Law School (LL.M. 1956-57, 1960; J.S.D. 1962).

Telford Taylor

Telford Taylor has a career remarkable for its variety of distinctive endeavor. He has been attorney, author, military prosecutor, and public official. Since 1963, he has been pro-

fessor of law at Columbia University Law School. Prior to that he was lecturer at Columbia Law School from 1958 through 1963 and has ben lecturing at Yale Law School since 1957. This most recent book is *The Breaking Wave*, published last March. He also is the author of *Sword and Swastika* (1952); *Grand Inquest* (1954); *The March of Conquest* (1958); and numerous articles on political, legal and military subjects. He is perhaps most universally remembered as United States chief counsel for war crimes following World War II, having served as a member of the staff of the chief of counsel and representative of the United States for the prosecution of war criminals from June, 1945, through October, 1946. In his earlier career he was instructor in history and political science, Williams College, 1928-1929; law clerk to U. S. circuit judge, New York, 1932-1933; assistant solicitor, U.S. Department of Interior, Washington, D.C., 1933-1934; senior attorney, Agricultural Adjustment Administration, 1934-1935; associate counsel, U.S. Senate Committee on Interstate Commerce, 1935-1939; special assistant to the Attorney General of the United States, 1939-1940; general counsel for the Federal Communications Commission, 1940-1942. He has practiced law; been administrator for the Small Defense Plants Administration, 1951-1952; counsel for the Joint Council for Educational Television, 1951-1961; chairman of the New York City Advisory Board for Public Welfare, 1960-1963, and a board member since that time. He received his A.B. from Williams College and his M.A., LL.B., and LL.D. degrees from Harvard University.

J. Braxton Craven, Jr.

J. Braxton Craven, Jr. has distinguished himself as a member of the state and federal judiciary during the past decade. His career has been marked by rapid progress up the legal ladder. He was appointed to his present position as judge of the United States Circuit Court, Fourth Circuit, by President Lyndon Johnson, on July 29, 1966. Prior to that he had been

named United States District Judge for the Western District of North Carolina by President John F. Kennedy as of August, 1961. In his earlier career he was solicitor of the Burke County, North Carolina, Criminal Court in 1948 (only a year after his admittance to the North Carolina Bar), assistant United States attorney for the Charlotte-Asheville area from 1948 to 1952, and judge of the Superior Court of North Carolina from 1956 to 1961. During the first term summer school, 1967, he taught at the University of North Carolina Law School. He said it was an exciting and rewarding experience. So did his students. Born in Lenoir, North Carolina, on April 3, 1918, Judge Craven received his A.B. degreee from Duke University in 1939, studied law at Duke, and received his LL.B. degree from Harvard University in 1942.

MASON P. THOMAS

Mason P. Thomas is associate professor of public law and government and assistant director, Institute of Government, University of North Carolina, with primary responsibility in areas of public welfare law and juvenile corrections. He has had professional experience in both the fields of social work and law. For five years he was a child welfare worker in the public welfare program in North Carolina; was counselor-solicitor of the Gaston County Domestic Relations and Juvenile Court for two years; and became judge of the Wake County Domestic Relations and Juvenile Court in 1959, where he served on the bench for five years. His publications include newspaper articles related to juvenile corrections, sterilization laws of North Carolina, the North Carolina Probation Commission; several articles in *Popular Government* on juvenile courts, school attendance problems; and, among others, *Delinquency and Juvenile Courts: Confusion and Diversity*, 25 Federal Probation 47 (1961); *The Juvenile Court Re-Examined: The U.S. Supreme Court Speaks*, 17 *Juvenile Court Judges Journal* 49 (1966); *The Judge's Role in Treatment—The Impact of the Juvenile Court Hearing*, a paper

presented to the Juvenile Corrections Workshop in Chapel Hill on June 27, 1967. He attended the University of North Carolina at Chapel Hill, where he received the B.S. Degree (Business Administration) in 1949 and graduated from the University of North Carolina School of Law in 1951 with an L.L.B. While in law school, he was a staff member of the *North Carolina Law Review*. He also attended the School of Social Service Administration, University of Chicago, graduate work in social work (1952-53).

A. Kenneth Pye

August Kenneth Pye is professor (since named dean) of law at Duke University. However, in 1966, he taught at Banaras Hindu University in India, where he reported by handwritten corrrespondence, he discovered a dearth of typewriters and secretaries. Before India, he was associate dean and professor of law at Georgetown University Law School (1961-1966). At Georgetown he also was director of the legal internship program (1960-61). He has been a practicing counsel at law; served as visiting professor at Johann Wolfgang Goethe University at Frankfurt am Main in Germany (summer, 1959); and been a member of the Judicial Conference of the D. C. Circuit and president of the trustees of the D. C. Bar Foundation (1962-1964). He was admitted to the District of Columbia Bar in 1953 and to practice before the U.S. Supreme Court in 1961. He also served on the staff of the government in the Appellate Division of the Office of the Judge Advocate General of the United States Army (1953-1955). Professor Pye received his A.B., *summa cum laude*, from the University of Buffalo in 1951 and his LL.B. (1953) and LL.M. (1955) from Georgetown University. In addition to articles, he is co-author of *Actual Operation of Articles 7 of the Status of Forces Agreement* (1958), *Status of Force Agreement* (1958), *Status of Forces Agreement: Criminal Jurisdiction* (1957). He is a member of the American Society of International Law; International Law Association; the

American, Federal, and District of Columbia Law Associations; Phi Beta Kappa; Phi Delta Phi; and Alpha Sigma Phi.

FRED P. GRAHAM

Fred P. Graham practiced law in Nashville, Tennessee, from 1960 to 1963. In January of 1963 he became chief counsel of the Senate Judiciary Subcommittee on Constitutional Amendments, and also served as legislative counsel to the late Senator Estes Kefauver. Mr. Graham served as special assistant to Secretary of Labor W. Willard Wirtz from October of 1963 to February of 1965, when he joined the news staff of the New York *Times*. Mr. Graham was selected by the *Times* to cover the United States Supreme Court. His educational background includes an A.B. degree from Yale, an L.L.B. from Vanderbilt, and a diploma in law from Oxford.

WAYNE R. LAFAVE

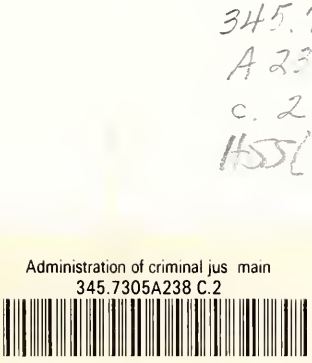
Wayne R. LaFave has moved far and fast in a few years. Along with Kenneth Pye, Ronald Goldfarb, Herman Goldstein, and others, he epitomizes the young man who has won national recognition for his accomplishments in the field of criminal justice. A member of the University of Illinois law faculty since 1961, LaFave is presently a full professor of law teaching criminal law, criminal procedure, criminal justice administration, and constitutional law. He has served as a staff member of the American Bar Foundation Survey of the Administration of Criminal Justice in the United States (1959-1965). He has also been a training consultant to the Chicago Police Department (1963 to date); reporter-draftsman, Committee on the Criminal Trial, of the American Bar Association Project on Minimum Standards for Criminal Justice (1965 to date); editor, University of Illinois *Law Forum* (1961-1966). He is the author of a definitive book *Arrest: The Decision To Take a Suspect into Custody* (1965). He was the editor of *Law in the Soviet Society* (1965) and co-editor of *International Trace, Investment, and Organization* (1967). He has

also been the author of several articles in law journals on various aspects of criminal justice administration. Currently, he is working on a student text on Criminal Law and Procedure. He has three degrees, all from the University of Wisconsin: B.S. (1957), LL.B. (1959), S.J.D. (1965).

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